Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

L.B. FOSTER COMPANY,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the appellate court disregarded Title VII of the Civil Rights Act, 42 U.S.C. § 2000 d (5)(k), and Supreme Court precedent by removing the award of prevailing defendant attorney's fees from the discretion of the district court by: (a) re-weighing the evidence and rejecting the district court's credibility determinations; (b) ruling that a lawsuit cannot be frivolous when a plaintiff states a prima facie case; (c) holding that a case cannot be frivolous unless there is direct, controlling circuit precedent on the issue; and (d) being predisposed to decline to grant attorney's fees to prevailing defendants.

PARTIES TO THE PROCEEDING

Petitioner L.B. Foster Company respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Third Circuit entered in this proceeding on August 25, 1997.

The Respondent is the United States Equal Employment Opportunity Commission. Ms. Jo Ann Wilson was an Intervenor-Plaintiff in the action in the United States District Court for the Western District of Pennsylvania. Ms. Wilson was not a party to the Motion for Attorney's Fees, which was the only subject of the Third Circuit appeal.

RULE 29(6) LIST

Petitioner has no parent companies, subsidiaries which are not wholly owned or affiliates to disclose pursuant to Rule 29(6) of the Rules of the Supreme Court.

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner L.B. Foster Company ("Foster" or the "Company") respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for the Third Circuit, entered in this proceeding on August 25, 1997.

CITATION OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit has been reported at 123 F.3d 746 (3d Cir. 1997) and is included within the Appendix for Petitioner submitted herein, commencing at page 1a. The order and the findings of fact and conclusions of law of the United States District Court for the Western District of Pennsylvania have not been reported and are included within the Appendix for Petitioner commencing at pages 18a (order) and 20a (findings of fact and conclusions of law). The Memorandum Opinion of the district court (which is incorporated by reference into the findings of fact on the attorneys' fee award) has not been reported and is included within the Appendix for Petitioner commencing at page 26a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on August 25, 1997. The jurisdiction of this Court is invoked pursuant to Section 1254(1) of Title 28, United States Code.

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)-5(k), provides:

> **Attorney's fee; liability of Commission and United States for costs**
>
> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND

The Equal Employment Opportunity Commission ("EEOC") originally filed a Complaint against Foster alleging that the Company discriminated against Jo Ann Wilson, a Regional Credit Manager, on the basis of her age and sex by failing to promote her to Corporate Credit Manager in violation of the Age Discrimination In Employment Act ("ADEA") and Title VII of the Civil Rights Act of 1964 ("Title VII"). The EEOC also claimed that Foster retaliated against Wilson in violation of Title VII by failing to provide an employment reference. Ms. Wilson intervened as a Plaintiff in the EEOC action and asserted, in addition to the claims above, claims that Foster violated the Equal Pay Act and constructively discharged Wilson in violation of the ADEA and Title VII. The district court granted partial summary judgment to Foster on the Equal Pay Act and constructive discharge claims.

As required by the district court's pretrial order, settlement discussions between Plaintiffs and the Company were attempted. However, settlement could not be meaningfully pursued, in large part because the EEOC filed a Motion for Leave to Amend Expert Report in order to seek backpay damages past the date of her resignation from Foster and because Foster considered only a nuisance settlement for a small percentage of its attorney's fees. On the last business day before trial, Plaintiffs dropped their ADEA claim, and the case proceeded as a bench trial before the Honorable Donald J. Lee on claims of sex discrimination and retaliation under Title VII.

II. STATEMENT OF FACTS

This Statement of Facts is based entirely on the findings of fact made by the district court judge which are set forth in the Memorandum Opinion ("MO") included in the Appendix commencing at page 26a.

A. Employment Histories of Ms. Wilson and Mr. Hahn

Ms. Wilson was initially employed by Foster as an Assistant Credit Manager in Houston, Texas. Ms. Wilson does not have a college degree. (MO, ¶ 9). She was promoted to Houston Division Credit Manager in 1982, to Credit Manager in December of 1994, and to Regional Credit Manager in February of 1995. (MO, ¶¶ 15-17, 20). As Regional Credit Manager, Ms. Wilson reported directly to Mr. Minor.

Mr. Hahn was employed as Credit Manager for Sterling Pipe and Supply Company ("Sterling"), a company which Foster acquired in 1985. He received an undergraduate degree from East Texas State University and an M.S. from Ohio State University. (MO, ¶ 31). Prior to his work for Sterling, Mr. Hahn was employed as a credit manager at Republic Supply, a company involved with the sale of oil country tubular goods. (MO, ¶ 34). Sterling was a customer of Foster, and prior to June of 1985, Sterling owed Foster in excess of $2 million. (MO, ¶ 39). Mr. Hahn worked directly with Mr. Minor in 1983, reviewing the status of accounts and analyzing Sterling's problematic receivables. Id. In June 1985, Foster acquired Sterling. (MO, ¶ 48). Mr. Hahn continued to report to Mr. Minor after the acquisition. Id.

B. Centralizing Foster's Credit Department

In late 1986, Foster centralized its credit department in Pittsburgh, Pennsylvania in response to difficult financial conditions within the industry. (MO, ¶ 64). In connection with the centralization, most department employees in Houston and Atlanta were laid off. (MO, ¶ 80). Mr. Minor was told that he could select only two Regional Credit Managers to come to headquarters in Pittsburgh. (MO, ¶ 65). Hahn and Wilson were selected, and they both accepted positions in Pittsburgh.

Ms. Wilson would have to take a loss on the sale of her home in Houston, and Mr. Minor was instrumental in securing an $8,500

"relocation" loan for Ms. Wilson, which would be forgiven if she stayed at Foster until January 1, 1989. (MO, ¶¶ 85-89). The Company had never advanced any other employee money in order to relocate. (MO, ¶ 90). They did not extend this offer to Mr. Hahn despite the fact that it was also impossible for him to sell his home at a profit. (MO, ¶ 88).

C. Performance Of Wilson And Hahn At Headquarters

As Regional Credit Managers in the Pittsburgh headquarters, Mr. Hahn and Ms. Wilson were given equal responsibilities. (MO, ¶ 93). Mr. Minor evaluated the workloads of Mr. Hahn and Ms. Wilson on a regular basis. (MO, ¶ 94). He interacted with them daily. (MO, ¶ 100). The district court concluded that Ms. Wilson's performance as Regional Credit Manager was below Mr. Minor's expectations in several important areas, including her credit presentations, organizational skills, analytical skills, long lunch breaks and late morning arrivals and unprofessional telephone manner. (MO, ¶¶ 101-118). In contrast to Ms. Wilson, the district court found that Mr. Hahn's management style was very professional. (MO, ¶ 120). He, unlike Ms. Wilson, was not condescending or brash. His dealings with customers and salespeople were professional. Id. Mr. Hahn also arrived very early for work and was prompt in his lunch hours. (MO, ¶ 121). Mr. Hahn's credit presentations were found to be much more professional and organized than Mr. Wilson's. (MO, ¶122). His analytical skills were also superior. (MO, ¶123).

D. Ms. Wilson's Intention To Return To Houston

Ms. Wilson was unhappy living in Pittsburgh and had every intention of moving back to Houston, Texas. Ms. Wilson commented to Mr. Minor on many occasions that she missed Houston. (MO, ¶ 129). Mr. Hahn also testified that she frequently told him, and others in the Credit Department, that she was not happy living in Pittsburgh because she did not like the weather or the people. (MO, ¶ 130).

Ms. Wilson, in fact, gave notice in late 1987, to Mr. Minor, Mr. Hahn, Ms. Terpenning and officers of the Company, that she planned to quit her job and move back to Houston in April of 1988. (MO, ¶¶ 131, 133). She explained that she had renters in her Houston home and the lease was expiring in April of 1988. (MO, ¶ 131). Her tenancy of her Pittsburgh residence also expired about the same time. Id.

On or about December 10, 1987, Mr. Minor was promoted from Corporate Credit Manager to Assistant Treasurer. (MO, ¶ 134). Shortly after Mr. Minor's promotion was announced, Ms. Wilson announced that she no longer planned to return to Houston. (MO, ¶ 136). Mr. Minor was suspicious since this purported change of mind came shortly after the job of Corporate Credit Manager became open. Id.

In early January 1988, Ms. Wilson confided to Ms. Carol Koss, Foster's District Credit Manager, that she wanted to return to Houston, but she was waiting until a decision was made on the corporate credit manager position. (MO, ¶ 138). Ms. Wilson admitted that she ultimately was returning to Houston. Id. However, she wanted to use the promotion on her resume when she returned to Houston. Id.

E. The Promotion Decision

Because of Mr. Minor's promotion, the position of Corporate Credit Manager was vacant. (MO, ¶ 139). After the announcement of Mr. Minor's promotion, Ms. Wilson approached Mr. Minor and asked him when she was going to get her promotion. (MO, ¶ 140). Ms. Wilson was very disturbed by the fact that Mr. Minor would consider other applicants for the position. Id. During two interviews with Mr. Minor, Ms. Wilson focused on criticizing Mr. Hahn and expressing her disappointmentthat someone else would be considered. (MO, ¶¶ 143-146).

Based upon his list of qualifications, and his extensive knowledge of the two candidates, Mr. Minor concluded that Mr. Hahn

was more qualified than Ms. Wilson for promotion to Corporate Credit Manager. Mr. Hahn's financial analysis skills were stronger. (MO, ¶ 149). According to Mr. Minor, financial analysis was "ten times" more important to the position of Corporate Credit Manager than to the position of regional manager. Management skill was considered very important to the position. (MO, ¶ 151). A number of people reported to that position. Id. It was important that the credit department function smoothly and the Corporate Credit Manager motivate people. Mr. Minor described Ms. Wilson's style of management as dictatorial. (MO, ¶ 151). Mr. Hahn's management style was that of a good manager. He motivated subordinates to increase their knowledge and understanding of the credit industry. Id.

Mr. Hahn's credit presentations were better than Ms. Wilson's. (MO, ¶ 152). They were more complete and more consistent with recommendations. Credit presentations are important to the corporate credit manager's job because he or she has to supply oral and written presentations to top management of the Company and educate them as to why certain financial decisions were made. Id.

The candidates' dedication to the Company was another important element in Mr. Minor's decision. (MO, ¶ 156). Ms. Wilson demonstrated her lack of dedication to Mr. Minor by her tardiness in the morning, her late lunch hours, and her intention to return to Houston. Mr. Minor did not believe Ms. Wilson's comment that she changed her mind about leaving Pittsburgh since she announced this change only after the position of Corporate Credit Manager became open. (MO, ¶ 136).

F. Wilson's Resignation Without Notice

Mr. Minor told Mr. Hahn and Ms. Wilson on Friday, January 29, 1988, that he had selected Mr. Hahn as Corporate Credit Manager. (MO, ¶ 178). In response, Ms. Wilson called Mr. Minor on the following Sunday afternoon to say that she could not accept his decision, could not work with Mr. Hahn, was quitting and would be in on Monday to pick up her personal effects. (MO, ¶ 179). Ms.

Wilson told Mr. Minor that she was going to file a sex discrimination suit and that he had used very poor judgment in naming Mr. Hahn. Id.

On Monday, Ms. Wilson arrived at the office and told Mr. Minor that she had thought further about his decision and was resigning. (MO, ¶ 180). She informed him that she would leave that day. Id. Ms. Wilson said she no longer felt that she was discriminated against on the basis of her sex and that she would not file sex discrimination charges. Id.

G. Foster's Reference Policy

Foster's practice in response to both oral and written reference checks is to confirm dates of employment and positions held. (MO, ¶ 186). After Ms. Wilson resigned, Mr. Minor received a telephone call for a reference from Johnston Pump and Valve Company ("Johnston Pump"), a major customer of Foster. (MO, ¶ 187). Mr. Minor told the caller that he could not give a reference on Ms. Wilson and transferred the call to Ms. Terpenning. (MO, ¶ 188).

Mr. Minor was concerned about giving Ms. Wilson a reference because she resigned without notice because she did not want to work for Mr. Hahn. (MO, ¶ 189). Mr. Minor did not want to hurt Ms. Wilson. He wanted her to find subsequent employment. Id. When Mr. Minor received the call from Johnston Pump, he did not believe that Ms. Wilson was going to file a sex discrimination charge — Ms. Wilson, after all, had told him that she was not going to file a charge. (MO, ¶ 190).

Ms. Terpenning received the call from Johnston Pump and confirmed Ms. Wilson's dates of employment and position held. (MO, ¶ 191). Her response was in conformance with her normal practice. Id. When she provided information to the caller from Johnston Pump, she had no knowledge that Ms. Wilson would file a sex discrimination claim. (MO, ¶ 192).

Mr. Minor had responded to reference requests from other former employees in circumstances when the employee advised him

that they would be using his name. (MO, ¶ 198). In these circumstances, Mr. Minor understood that he had the employees' verbal consent to release reference information. Id.

III. RELEVANT DISTRICT COURT OPINIONS

At the close of Plaintiffs' case, Foster filed a Motion for Judgment as a Matter of Law on the grounds that Plaintiffs did not establish a prima facie case of retaliation. This was a bench trial, and the court did not rule on the Motion at the time it was presented. Foster presented its case.

After the trial was concluded the court denied the EEOC's Motion to Amend Expert Report on the grounds that Ms. Wilson was not constructively discharged, and thus backpay damages past the date of Wilson's resignation were not available as a matter of law. The court granted Foster's Motion for Judgment as a Matter of Law on the retaliation claim. In a Memorandum Opinion, which included findings of fact and conclusions of law, the court entered judgment in favor of Foster on the claims of sex discrimination and retaliation.[1] (26a)

IV. APPLICATION FOR ATTORNEY'S FEES

Foster submitted an Application for Attorney's Fees from the EEOC. An evidentiary hearing was held on the Application for Fees. The parties submitted Findings of Fact and Conclusions of Law following the hearing. The district court issued "Preliminary Findings of Fact and Conclusions of Law," awarding fees to Foster on the grounds that under Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), the EEOC's action was "meritless, frivolous, unreasonable and without foundation." (20a) The district court enlisted a Special Master to determine the reasonable amount of fees

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[1]Although the Court granted Foster's Motion for Judgment as a Matter of Law on the retaliation claim, the district court also, in its Memorandum Opinion, made findings of fact and conclusions of law on the claim of retaliation.

for defense of the EEOC's claims.[2] Final judgment was entered granting Foster fees. (18a)

V. THIRD CIRCUIT'S RULING

The Third Circuit reversed the district court's award of fees. As to the retaliation claim, the Third Circuit "disagreed" with the district court's determination that the EEOC did not state a prima facie case of retaliation. (12a) The Third Circuit disagreed with the legal standard applied by the district court, which required the EEOC to show that the prospective employer would have hired plaintiff if a reference had been given. The Third Circuit, however, also re-weighed the evidence. The district court concluded that Wilson would have received a poor recommendation due to the circumstances under which she left the Company, and there was no adverse employment action. The Third Circuit disagreed, citing to purported inconsistencies in Minor's testimony, the Company's conduct on behalf of other employees, and some unspecified "temporal proximity" between Wilson's threat of a lawsuit and the denial of a reference. (14a) Moreover, in assessing "the Company's conduct on behalf of other employees," the appellate court again re-weighed the evidence. The district court found as a fact that Minor had provided references in the past for two types of employees: those who previously informed him they would give his name as a reference and those who had been laid off in 1986. The Third Circuit rejected this conclusion because "Minor's own testimony, however, does not suggest these limits." (14a at n.5)

As to the sex discrimination claim, the Third Circuit held that a reasonable fact finder could conclude that Foster discriminated against Wilson on the basis of sex, thus rejecting the district court's conclusion. "The EEOC's proof, if credited, would have been sufficient to support a verdict for the EEOC." (10a) The Third Circuit concluded, despite extensive findings of fact supporting the lower court's decision, that the district court engaged in post hoc

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[2] The parties eventually stipulated to the amount of fees to be awarded.

reasoning that because plaintiff did not prevail, the action must have been unreasonable or without foundation. (11a) Since Hahn could also have stated a prima facie case of discrimination if the Company had selected Wilson as Corporate Credit Manager, the Third Circuit, in the face of neutral statutory language, has established iron clad rule that the EEOC cannot ever be deemed to have acted unreasonably by filing suit whenever a company chooses between qualified applicants of different sexes.

As to the backpay the claim, Third Circuit recognized that the courts of appeals have been "nearly unanimous" in finding that a plaintiff who has not been constructively discharged cannot recover backpay. However, because "we have not yet ruled on this precise issue" and the Third Circuit stated that another appellate court would rule that fees were available under these facts, the Third Circuit held that the district court's finding of frivolousness could not stand. (17a)

REASONS FOR GRANTING THE WRIT

A. Introduction

The Third Circuit's opinion in this case produces an example of an appellate court distorting the standard for attorney's fees awards to prevailing defendants under Title VII of the Civil Rights Act ("Title VII") and other federal employment discrimination cases. Over 23,000 employment cases were filed in the federal district courts in 1996. Report of the Director, Judicial Business of the United States Courts (1996). Particularly with such a large caseload, the appellate courts should not, and cannot, ignore statutory language and Supreme Court precedent entrusting discretion to the district court judges. Indeed, the volume of cases alone makes it important for this Court to insure that appellate courts are interpreting 42 U.S.C. § 2000(e)-5(k) and Christiansburg correctly. Title VII expressly provides that "the court, in its discretion, may allow an award of attorneys' fees to the prevailing party. 42 U.S.C. § 2000(e)-5(k). This Court, in Christiansburg, held that the district court judge had discretion to determine whether an action was frivolous, meritless or without foundation, thus allowing an award of attorneys' fees to the prevailing

defendant. 434 U.S. at 421. Christiansburg specifically rejected a "mechanical construction" for determining whether fees should be awarded to prevailing defendants. Id. at 418.

In reversing the district judge's award of prevailing defendant's attorney's fees, the United States Court of Appeals for the Third Circuit, like several other appellate courts, disregarded Title VII and Supreme Court precedent by taking the decision away from the discretion of the district court judge and creating mechanical rules which deprive district courts of discretion to determine whether an action is frivolous, meritless or without foundation.

B. Courts Have Misapplied Christiansburg and Have Created Mechanical Rules.

1. A case can be frivolous when it turns on credibility.

In reversing the district court, the Third Circuit flatly rejected the district court's determinations on the credibility of the witnesses. For example, in concluding that the EEOC could not state a prima facie case of retaliation because it did not prove an adverse employment action, i.e., that Ms. Wilson would have received the job she sought had she received the reference, the Third Circuit rejected the district court's finding that Minor would have given Wilson a poor recommendation due to the circumstances under which she left. The Third Circuit relied on alleged "inconsistencies" in Minor's testimony[3], the Company's conduct on behalf of other employees[4],

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[3]The Third Circuit relied on the following: Minor testified at his deposition that the reason he did not provide a reference for Wilson over the telephone was that Linda Terpenning, the Vice President of Human Resources, instructed him to refer all such calls to her. (11a) At trial, Minor testified "I felt that I would only hurt Jo Ann by giving [Johnson Pump] a truthful reference.... I discussed it with human resources [ ] what would happen if someone called me because I didn't want to hurt Jo Ann. It was decided the best thing for me to do would be to refer [requests] to the human resources area." (12a) Ms. Terpenning denied specifically "directing" Mr. Minor to refer to her calls for references for Mr. Wilson. (12a) As a threshold matter, there is no contradiction between Minor concluding that "the best thing to do would be to

and the same unanalyzed "temporal proximity of Wilson's retracted threat and Minor's refusal to give a reference. In each of these circumstances, the appellate court disregarded the credibility determinations of the district court judge who sat through the trial and heard all the testimony. Incredibly, the appellate court simply disregarded the uncontroverted testimony that Wilson's retracted threat of litigation played no role in Minor's refusal to provide a reference on her.

In its opinion, the Third Circuit cited with approval to two other circuit court decisions reversing attorney's fees awards to defendants because the lower court's ruling was based upon its credibility determinations. In EEOC v. Kenneth Balk & Assocs., Inc., 813 F.2d 197 (8th Cir. 1987), the Court of Appeals for the Eighth Circuit ruled that the district court misapplied Christiansburg in part because the district court's findings of fact and conclusions of law disclosed that the court's ruling was based upon its credibility determinations. Id. at 198. See also EEOC v. Bruno's Restaurant, 13 F.3d 285 (9th Cir. 1993).

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refer requests to the Human Resources Department" and Terpenning denying that she specifically "directed" that references for Wilson be referred to her. However, even if this were "inconsistent," a mild inconsistency on a tangential issue hardly justifies the creation of a mechanical rule divesting the district court of discretion when there is not absolute synchronization of defendants' testimony. It does not make the EEOC's claim more reasonable. More importantly, however, the Third Circuit's analysis of this issue illustrates complete disregard for the discretion of the district court judge to make the underlying factual findings

[4]As to treatment of others, the district court found as a fact that Minor provided such references only for two types of employees: those who previously informed Minor that they had given his name as a reference and those who were laid off in 1986. According to the district court, in both circumstances Minor understood that he had the verbal consent of the employee to release reference information. (MO, ¶¶ 198-99) The Third Circuit disagreed with this finding, which was completely supported by the testimony of David Minor. To do so, the Third Circuit relied on a single response, taken out of context, to find that "Minor's own testimony . . . does not suggest these limits." (14a at n.5)

This approach of rejecting fee awards which are based on credibility determinations is flawed. First, as also noted below, the substantive law governing motions pursuant to Federal Rules 12 (b)(6) and 56 essentially requires the district courts to accept as true allegations in complaints as well as the non-moving party's evidence, no matter how contradicted. At trial, however, it is the job of the district court judge, who hears all the testimony, to make credibility determinations. An incredible plaintiff can have a frivolous case. By disregarding these determinations, and finding a case cannot be frivolous if there is "some" evidence of discrimination (even if the district court rejects it based on credibility), the Third Circuit, as well as other appellate courts, disregard Christiansburg which entrusts fee awards to the discretion of the district court judge.

Second, this standard does not fulfill the objective of Christiansburg -- to discourage baseless suits. It only encourages a plaintiff to lie at trial to avoid a fee award to a prevailing defendant.[5]

Third, such an approach renders useless the knowledge gained by the district court which either may not be part of the record or which is not accurately or adequately conveyed by the record. In Pierce v. Underwood, 487 U.S. 552 (1988), this Court addressed whether the Government's position was "substantially justified" to support a fee award under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d) (1994). This Court commented that some of the elements that bear upon whether the position was "substantially justified" may be known only to the district court:

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[5] The Third Circuit cited Dorn's Transportation v. Teamsters Pension Trust Fund, 799 F.2d 45, 49 (3d Cir. 1996), for the proposition that defendants "needed no encouragement to defend suits against them" and "were not vindicating an important public policy." Clearly, however, defendants have every intention to settle frivolous lawsuits if there is no chance of recovering attorney's fees. Moreover, the exposure of frivolous cases (which may on occasion be more redolent of extortion than seeking a remedy for discrimination) to fee awards to prevailing defendants may deter frivolous suits and enhance the overall credibility of the anti-discrimination laws.

> Not infrequently, the question will turn upon not merely what was the law, but what was the evidence regarding the facts. By reason of settlement conferences and other pretrial activities, the district court may have insights not conveyed by the record, into such matters as whether particular evidence was worthy of being relied upon, or whether critical facts could easily have been verified by the Government.

487 U.S. at 501.

In this case there was no way for the appellate court to know, as the district court did, that the case proceeded to trial to blacken David Minor's reputation. It was conveyed to Foster's counsel by counsel for plaintiffs, for example, that the Company "dare not" proceed to trial because Minor was having a romantic relationship which would be disclosed at trial.

The district court knew this, if not directly from settlement discussions, at least from the fact that plaintiffs asserted at trial that Foster's articulated reason for the non-promotion was because of Ms. Wilson's criticisms of Minor's personal relationship. The district court flatly rejected the EEOC's attempts to argue that his personal relationship somehow created evidence of sex discrimination. (MO, ¶¶ 170-76). Indeed, the evidence of record showed that Ms. Wilson herself never believed Minor's relationship had anything to do with the non-promotion.

The district court also was aware that plaintiffs' personal attack against Mr. Minor did not stop with the "evidence" of Minor's personal relationship. Minor was cross-examined extensively regarding an alleged comment he made about a female applicant's legs. (Tr. 11/19/92 at 196 at seq.) Perhaps the best evidence of plaintiffs' attempts to flat-out defame Minor was Bonnie Toadvyn's baseless and idiotic testimony about "I think f___ing the boss for 35 cents an hour is bizarre." (Tr. 11/17/92 at 189).

These factors, as well as all of the knowledge gained by the district court judge throughout his years of handling of the case, are pertinent to the determination of the fee award. When appellate courts reject credibility determinations, the district courts are stripped of the discretion which Christiansburg preferred over mechanical rules. The district court undoubtably recognized the EEOC's entire case to be nothing more than a crude attempt to extort payment from an innocent defendant and emphatically rejected the Motion that a federal court may be used as the scheme's collection arm.

2. A case can be unreasonable even when a plaintiff states a prima facie case and the case reaches trial.

The Third Circuit found that the case could not be frivolous because the EEOC stated a prima facie case of retaliation. (15a) The EEOC's ultimate burden was to prove retaliation. The district court found as a fact that "the EEOC failed to adduce evidence to support the retaliation claim."[6]

Likewise, several courts have held that a case cannot be frivolous so as to warrant an award of fees to the prevailing defendant when defendant's motion for involuntary dismissal or motion for summary judgment have been denied. See, e.g., Kenneth Balk, 813 F.2d at 198; Sullivan v. School Board of Pinellas County, 773 F.2d 1182 (11th Cir. 1985); Beard v. Annis, 730 F.2d 741 (11th Cir. 1984); Jones v. Dealers Tractor and Equipment Co., 634 F.2d 180 (5th Cir. 1981); Church of Scientology of Calif. v. Cazares, 638 F.2d 1272 (5th Cir. 1981).

Indeed, the Third Circuit cited to other circuit courts which specifically articulate as "factors considered important" in determining whether a claim is frivolous: (1) whether the plaintiff

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[6] The district court made findings that plaintiffs did not meet their burden of proving that the Company's articulated reasons were a pretext and that the Company's real motivation was retaliatory. (59a ¶ 50)

established a prima facie case; (2) whether the defendant offered to settle; and (3) whether the trial court dismissed the case prior to trial or held a full blown trial on the merits. (8a) See Sullivan, 773 F.2d at 1189; Jones, 656 F.2d at 1146.

Although the courts apply these factors, none of them necessarily reflect that a case is non-frivolous or reasonable. A plaintiff's burden of proving a prima facie case is very light. Massarsky v. General Motors Corp., 706 F.2d 111, 118 (3d Cir.), cert. denied, 464 U.S. 937 (1983). Even plaintiffs with frivolous claims can state a prima facie case. The plaintiff's ultimate burden is to prove that the reason offered by the employer was a pretext for illegal discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973). Summary judgment for defendants in employment discrimination cases is "generally inappropriate" because the cases turn on the state of mind and credibility of the defendant. Marzano v. Computer Science Corp. Inc., 91 F.3d 497, 509 (3d Cir. 1996). Thus, lacking an ability to judge the credibility of the witnesses, a court may be precluded from entering summary judgment in even frivolous employment discrimination claims. Even unreasonable claims may not be dismissed prior to trial.

3. Employers have a right to settle even frivolous claims to avoid litigation costs.

Likewise, whether the defendant offered to settle does not necessarily reflect on the relative merits of the claim. Defending even the most frivolous claims costs money, sometimes lots of money. Christiansburg expressly recognized that many defendants in Title VII claims are small and moderate size employers for whom the expense of defending even a frivolous claim may become a strong disincentive to the exercise of their legal rights. 434 U.S. at 422 n.20. Employers settle even frivolous claims, and an offer to settle to avoid the time and expense of litigation does not reflect upon the underlying merits

of the lawsuit. Once again, the "standards" applied by the appellate courts stray far from the intentions of Christiansburg.[7]

4. A case can be meritless even when there is no direct circuit precedent, particularly when every circuit court to decide the issue held contrary to the plaintiffs' position.

The district court explicitly found that the EEOC's request for backpay, even though Ms. Wilson had not been constructively discharged, was frivolous. The district court had granted summary judgment to Foster on the Intervenor's constructive discharge claim. The EEOC, however, maintained the position that Ms. Wilson was entitled to backpay damages from the date of her resignation through the date of any judgment. The district court, in finding the EEOC's position frivolous, commented that the circuit courts of appeals have been unanimous in their application of the general rule that an employee who is denied a promotion is entitled to an award of backpay past the date of resignation only if she was actually or constructively discharged.[8] The district court also noted that the Court

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[7] Foster considered settling this case only as a nuisance, with any settlement payment being a small percentage of the Company's attorney's fees. Under the Third Circuit's mechanical rules of construction, defendants will almost always find it cheaper to "buy off" frivolous claims instead of insisting on their rights to defend them.

[8] See, e.g., Landgraf v. USI Film Products, 968 F.2d 427, 429 (5th Cir. 1992) (because plaintiff voluntarily left her employment, she must demonstrate that she was constructively discharged in order to recover backpay as damages), aff'd, 511 U.S. 244 (1994); Jurgens v. Equal Employment Opportunity Commission, 903 F.2d 386 (5th Cir. 1990) (in order for employee to recover backpay and lost wages beyond the date of retirement or resignation, evidence must establish constructive discharge); Brooms v. Regal Tube Co., 881 F.2d 412, 423 (7th Cir. 1989) (because Title VII provides only for equitable relief, a District Court may award backpay only as an equitable remedy, i.e., if a plaintiff can demonstrate that the employer discharged him either actually or constructively); Morrison v. Genuine Parts Company, 828 F.2d 708, 709 n.1 (11th Cir. 1987) (District Court must deny backpay and reinstatement when no finding of constructive discharge), cert. denied, 484 U.S. 1065 (1988); Maney v.

of Appeals for the Third Circuit recognized that great weight attaches to a judicial determination of constructive discharge, stating that "[c]lassifying a termination as a constructive discharge rather than a voluntary quit has significant ramifications with respect to the scope of relief." Goss v. Exxon Office Systems Company, 747 F.2d 885, 887 (3d Cir. 1984).

The Third Circuit recognized that the appellate courts have been "nearly unanimous" in holding that a victorious plaintiff who is not constructively discharged is not entitled to recover past the resignation, that the Third Circuit in Goss recognized the implications of constructive discharge on the scope of relief, and that the rationale behind the rule is that discrimination should be attacked from within the context of existing employment relationships. Nonetheless, the Third Circuit reversed the district court's finding of frivolousness, stating that "[s]ince we have not yet ruled on this precise issue and since one of our sister courts of appeals has ruled that back pay would be recoverable under the facts alleged by the EEOC, the district court's determination that the EEOC's request for back pay was frivolous cannot stand."[9] (17a)

Brinkley Municipal WaterWorks and Sewer Department, 802 F.2d 1073, 1075 (8th Cir. 1986) (general rule is that employees are entitled to backpay and reinstatement only if they were actually or constructively discharged); Satterwhite v. Smith, 744 F.2d 1380, 1381 (9th Cir. 1984) (an employee who quits cannot secure backpay unless she was constructively discharged); Clark v. Marsh, 665 F.2d 1168 (D.C. Cir. 1981) (to sustain award of damages, court must find constructive discharge); Harrington v. Vandalia-Butler Board of Education, 858 F.2d 192, 197 (6th Cir. 1978) (backpay, reinstatement not available when no constructive discharge), cert. denied, 441 U.S. 932 (1979); Muller v. United Stated Steel Corp., 509 F.2d 923, 930 (10th Cir. 1975) (unless plaintiff is constructively discharged, he is not entitled to backpay after the date of leaving employment; plaintiff is entitled to damages only to the date of his resignation), cert. denied, 423 U.S. 825 (1975).

[9]The "sister court's" opinion is so easily distinguishable that the Third Circuit obviously simply disagreed with the result reached by the district court. In Wells v. North Carolina Bd. of Alcoholic Control, 714 F.2d 340 (4th Cir. 1983), the plaintiff held the physically demanding position of stock clerk, and was discriminatorily denied a promotion to a less strenuous position of sales clerk. Twelve months later, when the plaintiff injured himself and could not perform stock clerk

In essence, the Third Circuit held that in the absence of a controlling opinion in that circuit, a district court cannot find a claim to be frivolous. By reversing the district court on this issue, the Third Circuit flatly second-guessed the district court's determination that the claim was frivolous. Furthermore, the Third Circuit rule is precisely the "mechanical construction" for awarding attorneys' fees which was rejected by Christiansburg, 434 U.S. at 418.

5. The circuit courts improperly are predisposed to not award fees to prevailing defendants.

In Christiansburg, this Court clarified that the standard for awarding attorney's fees to prevailing defendants is not the same as the standard for prevailing plaintiffs. Although this Court adopted a stricter standard for fee awards to defendants, i.e., that the action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith, the Third Circuit as well as other circuit courts have improperly extended this into a presumption that fees to defendants shall not be awarded. The Third Circuit in the instant case articulated this as follows: "'[i]t is clear from Christiansburg that attorney's fees [to a prevailing Title VII defendant] are not routine, but are to be only sparingly awarded.'" (7a) (quoting Quiroga v. Hasbro, Inc., 934 F.2d 497, 503 (3d Cir. 1991)). Other circuit courts proceed with this same predisposition. See Glymph v. Spartanburgh General Hosp., 783 F.2d 476, 479 (4th Cir. 1986) (district courts should award such fees "sparingly").

Title VII makes no distinction between plaintiffs and defendants. Christiansburg did not conclude that fees to defendants are to be rarely or sparingly awarded; it simply articulated the

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duties, he requested light duty and his request was denied. The Fourth Circuit did not decide the issue of constructive discharge, but held instead that the plaintiff was entitled to back pay beyond the date of his quit based on the fact that if he had not been discriminated against, he would have been in the light duty position of sales clerk, a position in which he could have continued to work. Id. at 342.

standard to be applied. The circuit courts have strayed far from Christiansburg. Fees to defendants should be granted in cases which are frivolous, unreasonable or without foundation. If there are many cases that meet that criteria, fee awards should be frequently granted.

C. Conclusion

Christiansburg did not quantify the amount of evidence a plaintiff needed to adduce to avoid an award of attorney's fees to the prevailing defendant. Instead, this Court entrusted the decision to the discretion of the district court judges who hear the evidence and sit through the trials. The Third Circuit, as well as other appellate courts, have ignored Christiansburg by taking discretion away from the district court and by applying illogical, mechanical rules which deprive district courts of discretion to award fees to a prevailing defendant. Particularly given the large number of employment discrimination cases, this is an important issue to all federal courts.

For the foregoing reasons, Petitioner L.B. Foster Company respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

Respectfully submitted,

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APPENDIX

Filed August 25, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-3469

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
JO ANN WILSON, Intervenor

v.

L.B. FOSTER COMPANY

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. No. 90-0758)

Argued: April 30, 1997

Before: MANSMANN, MCKEE, *Circuit Judges*, and
VANARTSDALEN,* *District Judge*.

(Filed August 25, 1997)

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*The Honorable Donald W. VanArtsdalen, United States District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

McKEE, *Circuit Judge.*

In this appeal, we are asked to review the district court's order awarding attorney's fees pursuant to section 706(k) of Title VII to L.B. Foster Co. as the prevailing defendant in the Title VII action brought by the Equal Employment Opportunity Commission ("EEOC") against that company. For the reasons explained below, we will reverse.

I.

L.B. Foster manufactures and sells rail construction and tubular products. In 1980, Jo Ann Wilson was hired in the company's Houston office. She was later promoted to credit manager. In 1986, following the reorganization of the company's credit department, Wilson relocated to Foster's headquarters in Pittsburgh, Pennsylvania.

A year after her transfer to Pittsburgh, Wilson began expressing a desire to return to Houston. However, Wilson changed her mind after David Minor, the corporate credit manager, was promoted to Assistant Treasurer in December 1987. Minor's promotion created a vacancy in his former position that Wilson was interested in filling. The corporate credit manager is responsible for the implementation of the company's credit policies and therefore had to possess the "ability to understand and . . . interpret financial and credit information, . . . correspond with customers and salespeople under difficult circumstances . . . [and had to have a] complete knowledge of uniform commercial codes, financing arrangements, commercial contracts, bankruptcy, international trade, bond and lien laws, and various credit instruments, [the] ability to manage as well as motivate subordinates and the ability to interact with management." App. at 565.

In January 1988, Wilson approached Minor and expressed an interest in his old position. She was disappointed to learn that Minor was also considering Steven Hahn for the promotion. Hahn had also transferred

to the company's headquarters after the reorganization of its credit department, and, like Wilson, he was a regional credit manager in the Pittsburgh office. Minor supervised both Hahn and Wilson and, although he regularly interacted with both of them, he was more familiar with Hahn's work. Minor considered Hahn's management style very professional, his credit presentations well constructed, his financial analysis very strong, and his interactions with customers and sales representatives courteous and professional.

Minor interviewed Wilson and Hahn for the position. During her interview, Wilson criticized Hahn and challenged Minor to identify her shortcomings. Minor had criticized Wilson's credit presentations on several prior occasions because information and documents had been missing. Minor was also critical of Wilson's long lunches and telephone mannerisms. Overall, however, Minor regarded Wilson as a valued employee. Wilson did not acknowledge any of these deficiencies in her interview. Instead, she only discussed problems she perceived in Hahn. Minor was generally disappointed by Wilson's interview and regarded her criticism of Hahn as unprofessional.

After considering the qualifications of both candidates, Minor recommended that Hahn receive the promotion because Minor thought that Hahn's analytical, management, and interpersonal skills were superior to Wilson's. Minor also thought that Hahn had demonstrated greater dedication to the company. After Human Resources approved Minor's recommendation, Hahn was informed, and, two days later, Wilson resigned from her position and told Minor that she intended to file a sex discrimination suit against him and the company. However, Wilson apparently had second thoughts about doing so, and, the very next day, she told Minor that, while her resignation was still effective, she had changed her mind about suing.

A few months after Wilson left the company, a representative of Johnston Pump and Valve Co., one of L.B. Foster's largest customers, called Minor and requested a job reference for Wilson. Minor had provided such references in the past, but he refused to provide the

requested reference for Wilson and instead referred the call to the personnel department. Personnel did not give Wilson a reference but merely furnished her dates of employment. Wilson did not receive a job offer from Johnston Pump.

The EEOC brought a Title VII action against the L.B. Foster Co. in 1990 alleging that Wilson had not been promoted because of sexual discrimination. The complaint also alleged that the company had refused to provide the job reference for Wilson in retaliation for her threat to sue after she resigned. Wilson later intervened in the action and asserted similar claims. L.B. Foster Co. moved for summary judgment but that motion was denied, and the case proceeded to a bench trial in the district court.

The EEOC presented evidence suggesting that L.B. Foster's proffered explanation for giving Hahn the promotion—that he was better qualified—was pretextual. That presentation included evidence that Hahn had been criticized for deficiencies prior to his promotion to Minor's former position and that L.B. Foster had reassigned certain territories to Wilson because of those deficiencies. After the close of the EEOC's evidence, the company moved for judgment as a matter of law, but the court deferred ruling on that motion. The court, however, ultimately found in favor of L.B. Foster on both the failure-to-promote and retaliation claims and entered judgment for the company. Thereafter, the company moved for attorney's fees as the prevailing party under section 706(k) of Title VII. The court awarded the requested fees based upon its conclusion that the EEOC's action was meritless, frivolous, unreasonable and without foundation. Both parties agreed that, if Foster were entitled to any counsel fees, the reasonable amount of those fees would be $142,628.50. Accordingly, the court entered judgment in that amount in favor of L.B. Foster. This appeal challenging only the court's determination that L.B. Foster was entitled to any attorney's fees followed.

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1345. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II.

This Court reviews a district court's award of attorney's fees for abuse of discretion. *See Washington v. Philadelphia*

County Court of Common Pleas, 89 F.3d 1031 (3d Cir. 1996); *Brown v. Borough of Chambersburg*, 903 F.2d 274 (3d Cir. 1990). "We must defer to the district court's fee determination unless it has erred legally, or the facts on which the determination rests are clearly erroneous." *Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 502 (3d Cir. 1991)(citations omitted). The EEOC contends that the district court erred in finding that its suit was "frivolous, unreasonable, or without foundation" and awarding attorney's fees on that basis.

III.

42 U.S.C. § 2000e-5(k) provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-5(k). The "prevailing party" can be either the plaintiff or the defendant. However, in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), the Supreme Court clarified that the standard for awarding attorney's fees to prevailing defendants is not the same as the standard for prevailing plaintiffs.

> In *Christiansburg*, the Court recognized that while a liberal fees standard should be used for those parties whose suits Congress wished to encourage, and who needed this encouragement to bring the suits, a stricter standard was appropriate for defendants, who needed no encouragement to defend suits against them and who were not vindicating an important public policy.

Dorn's Transp., Inc. v. Teamsters Pension Trust Fund, 799 F.2d 45, 49 (3d Cir. 1986).

Prevailing plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.* at 416-17 (internal quotations

omitted). The rationale for this rule is twofold. First, "the plaintiff is the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" *Id.* at 418. Second, "when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law." *Id.*

These considerations are wholly absent when the prevailing party is a defendant, and, therefore, a higher standard applies. In *Christiansburg Garment*, the Court defined that standard as follows:

> [A] district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.[1]

Id. at 421. "[F]rivolous, unreasonable, or without foundation," in this context, implies "groundless . . . rather than simply that the plaintiff has ultimately lost his case." *Id.* "[I]t is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Id.* at 421-22. Such post hoc reasoning "would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII." *Id.* at 422. Thus, we have previously stated "It is clear from *Christiansburg* that attorney's fees [to a prevailing Title VII defendant] are not routine, but are to be only sparingly awarded." *Quiroga*, 934 F.2d at 503.

Several courts of appeals have reversed fee awards to prevailing defendants in lawsuits brought by the EEOC where these guiding principles have been misapplied. *See, e.g., EEOC v. Bruno's Restaurant*, 13 F.3d 285 (9th Cir. 1993); *EEOC v. Reichhold Chems., Inc.*, 988 F.2d 1564 (11th Cir. 1993); *EEOC v. Kenneth Balk & Assocs., Inc.*, 813 F.2d 197 (8th Cir. 1987); *EEOC v. St. Louis-San Francisco Ry. Co.*, 743 F.2d 739 (10th Cir. 1984). *But see EEOC v.*

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1. The standard is the same when the Commission is the losing plaintiff.

Pierce Packing Co., 669 F.2d 605 (9th Cir. 1982)(affirming award of attorney's fees to employer because the EEOC "fail[ed] to comply with both its enabling act and its regulations"). In contrast, "[c]ases where findings of 'frivolity' have been sustained typically have been decided in the defendant's favor on a motion for summary judgment or a . . . motion for involuntary dismissal. In these cases, the plaintiffs did not introduce any evidence to support their claims. [On the other hand, i]n cases where the plaintiffs introduced evidence sufficient to support their claims, findings of frivolity typically do not stand." *Sullivan v. School Bd.*, 773 F.2d 1182, 1189 (11th Cir. 1985)(citations omitted).

In determining if an award of counsel fees to a Title VII defendant is appropriate, courts should consider several factors including "(1) whether the plaintiff established a prima facie case; (2) whether the defendant offered to settle; and (3) whether the trial court dismissed the case prior to trial or held a full-blown trial on the merits." *Id.*[2] These factors are, however, guideposts, not hard and fast rules. "Determinations regarding frivolity are to be made on a case-by-case basis." *Sullivan*, 773 F.2d at 1189.

Even though an inquiry into an award of attorney's fees to a Title VII defendant is individualized, specific examples of awards that have been reversed assist in illustrating the policy behind the rule enunciated in *Christiansburg*. *EEOC v. Kenneth Balk & Assocs.*, 813 F.2d 197 (8th Cir. 1987) is one example. There, the EEOC filed a Title VII action on behalf of a former employee alleging that the employer, Kenneth Balk Associates ("KBA"), had discharged her on the basis of race. The case was tried for three days before being continued to permit the parties to conduct additional discovery. The court then heard more evidence and granted the parties time to file post-trial briefs and proposed

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2. *But see Greenberg v. Hilton Int'l Co.*, 870 F.2d 926, 940 (2d Cir. 1989)("Cases that are ultimately viewed as frivolous may well survive motions to dismiss under a system of notice pleading that does not require factual detail and even motions for summary judgment in which the evidence may be presented in sketchy fashion and credibility may not be taken into account.").

findings of fact and conclusions of law. Ultimately, judgment was entered in favor of KBA; the court awarded counsel fees; and the EEOC appealed.

The Court of Appeals for the Eighth Circuit ruled that the district court had misapplied the *Christiansburg* standard. The procedural history of the case suggested that the EEOC's claim was not baseless as KBA neither sought a pretrial dismissal nor moved for summary judgment or a directed verdict. In addition, the district court had permitted the parties to file post-trial briefs and proposed factual and legal conclusions. Furthermore, the district court's findings of fact and conclusions of law disclosed that the court's ruling was based upon its credibility determinations. *See id.* at 198. Thus, the record suggested that the EEOC had some basis for its claim, and the court of appeals reversed the award of counsel fees. *See id.* In doing so, the court stated "[h]owever unpersuasive the EEOC's evidence ultimately proved to be, this evidence provided 'some basis' for the EEOC's claim. Accordingly, the district court misapplied the *Christiansburg* standard . . . ." *Id.*; *see also Bruno's Restaurant*, 13 F.3d at 290 (concluding that the "district court failed to exercise its discretion within the permissible bounds of 42 U.S.C. § 2000e-5(k) and within the requirements of *Christianburg* in awarding fees on the ground that the EEOC presented no credible evidence of discriminatory conduct").

IV.

Here, the EEOC alleged sex discrimination and illegal retaliation against Wilson. We consider in turn the findings the district court made with respect to each allegation to determine whether those claims were "frivolous, unreasonable, or without foundation."

A. Sex Discrimination Claim

The EEOC presented a classic pretext-based case of sex discrimination. Wilson was obviously a member of a protected class; she applied for a promotion for which she was qualified; and the promotion went to a male. The district court correctly concluded that these allegations

made out a prima facie case on behalf of Wilson. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The EEOC then presented evidence that L.B. Foster's proffered non-discriminatory explanation for its decision to promote Hahn, the male applicant, over Wilson was a fabrication. This included evidence "that Wilson had greater management experience, that Wilson was assigned a broader range of job duties, that Hahn had problems in performing his job, and that Wilson, on occasion, had to assist Hahn with his accounts." Appellant Br. at 17. Clearly, a reasonable fact finder could conclude from this evidence that L.B. Foster discriminated against Wilson on the basis of sex. *See Bray v. Marriott Hotels*, 110 F.3d 986, 990 (3d Cir. 1997)("The inference [of pretext], along with the components of the plaintiff's prima facie case, allow a jury to conclude that the employer was actually motivated by illegal bias . . . ."); *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1066-67 (3d Cir. 1996)(same), *cert. denied*, 117 S. Ct. 2532 (1997).

It can hardly be said that the EEOC's claim was frivolous merely because the court (sitting as the fact finder) rejected the EEOC's evidence.[3] *See* app. at 584 ("Wilson has not established her burden of proving pretext under *Hicks* that the company's articulated reasons for not promoting her are false and that sex discrimination was the real reason."). On the contrary, the EEOC's proof, if credited, would have been sufficient to support a verdict in favor of the EEOC. Accordingly, we cannot agree that the claim was frivolous or without foundation. *See Bruno's Restaurant*, 13 F.3d at

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3. The district court's conclusion that "the evidence clearly and convincingly established that there was no sexual discrimination involved in Foster's [decision]" suggests that it was persuaded by Foster's evidence that Minor had promoted and retained a number of female employees. However, such evidence is not necessarily relevant to whether the company discriminated against Wilson. *See Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579 (1978)(a racially balanced work force "cannot immunize an employer from liability for specific acts of discrimination"); *Bell v. Bolger*, 708 F.2d 1312, 1318 (8th Cir. 1983)("Merely because other members of a protected class . . . were recommended [for position denied the plaintiff] does not demonstrate an absence of discrimination.").

290 ("The district court failed to exercise its discretion . . . within the requirements of *Christianburg* in awarding fees on the ground that the EEOC presented no *credible* evidence of discriminatory conduct." (emphasis added)).

Here, it appears that the district court "failed to heed the Supreme Court's warning in *Christiansburg* against the 'temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation.'" *Id.* at 290 (quoting *Christiansburg*, 434 U.S. at 421-22). "Assessing fees against the EEOC simply because it did not prevail undercuts the Congressional effort 'to promote the vigorous enforcement of the provisions of Title VII.'" *Bruno's Restaurant*, 13 F.3d at 290 (quoting *Christiansburg*, 434 U.S. at 422). Accordingly, the district court abused its discretion in awarding L.B. Foster its fees for defending against the substantive claim under Title VII.

B. Retaliation Claim

The EEOC's retaliation claim alleged that Minor refused to provide a reference for Wilson after she had informed him that she intended to file a discrimination claim. Wilson apparently "assumed that [she] would get a reference just like all of the other people who had been at Foster." App. at 110. However, when Johnston Pump sought a reference for Wilson, Minor refused to provide one. *See* app. at 295. It is not disputed that L.B. Foster had routinely provided such references for others in the past.

In his deposition, Minor testified that the reason he did not provide a reference for Wilson over the telephone was that Linda Terpenning, who worked in the personnel department, had instructed him to refer all such calls to her. *See* app. at 100, 152. At trial, however, Minor testified that his refusal had more to do with not wanting to hurt Wilson by giving her a negative reference: "I felt that I would only hurt Jo Ann by giving [Johnston Pump] a truthful reference. . . . I discussed it with human resources [] what would happen if someone called me because I didn't want to hurt Jo Ann. It was decided the best thing for me

to do would be to refer [requests] to the human resources area." App. at 295. Minor's testimony was directly contradicted by Terpenning: "Q: Did you ever direct Mr. Minor that reference calls should be directed to your attention, reference calls for Wilson? A: For Wilson, no." App. at 355 (Direct Examination of Terpenning). We have previously stated that a district court can consider an employer's inconsistent explanations for the adverse action it took in determining whether that employer discriminated against the plaintiff. *See Waddell v. Small Tube Prods., Inc.*, 799 F.2d 69, 73 (3d Cir. 1986). Inconsistencies are no less relevant in adjudicating a claim of illegal retaliation under Title VII.

Minor also testified that, when Johnston Pump called, he did not believe that Wilson was still contemplating filing a discrimination charge: "Jo Ann told me when she came in the office the following Monday that she had decided that she would no longer pursue [a sex discrimination charge] and that was not a course of action she was taking. So, when the call came from Johnston Pump, there was no pending suit against L.B. Foster Company." App. at 293-94. The district court apparently credited that testimony. *See* app. at 589. However, Minor had taken notes in which he recorded "she was considering filing a [discrimination] charge." App. at 377.

On this record, the district court concluded that Wilson had not established a prima facie case of retaliation because she had not presented evidence of an adverse employment action and, presumably on that basis, the district court concluded that the EEOC's retaliation claim was frivolous. We disagree.

The district court improperly focused on the action of the prospective employer and not L.B. Foster in determining whether the EEOC had presented evidence of an adverse employment action. The district court concluded that "[t]here is no evidence that Foster's response to the telephone call from Johnston Pump negatively influenced Wilson's application for employment with Johnston Pump." App. at 588. However, that is not the proper test.[4] All that

4. L.B. Foster argues that, "[i]n a case in which a plaintiff alleges denial of a reference is retaliatory, the plaintiff must demonstrate that the

is required to establish a prima facie case of retaliatory discrimination is proof (1) that the plaintiff engaged in protected activity, (2) that the employer took an adverse action against her, and (3) that a causal link exists between the protected activity and the employer's adverse action. *Kachmar v. Sungard Data Sys., Inc.*, 109 F.3d 173 (3d Cir. 1997). An employer who retaliates can not escape liability merely because the retaliation falls short of its intended result.

Here, the EEOC clearly established a prima facie case of retaliatory discrimination. Wilson was engaged in protected activity when she informed Minor that she intended to file a sex discrimination charge. *See Barber v. CSX Distribution Servs.*, 68 F.3d 694, 702 (3d Cir. 1995)(describing indicia of protected activity); *Sumner v. United States Postal Serv.*, 899 F.2d 203, 209 (2d Cir. 1990)(same). Wilson's subsequent statement to Minor that she had changed her mind about filing a charge does not negate her earlier

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employer's denial of the reference caused an adverse employment action," specifically that the prospective employer would have hired the employee but for the absence of the reference. Appellee Br. at 34 (citing *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1538 (11th Cir. 1990)). That contention is only true in circumstances—not present here—where the plaintiff brings a damages claim against her former employer. *See id.* at 2538 n.2 ("[I]n order to make out a *damages claim against the former employer* whose blacklisting has prevented the ex-employee from working elsewhere, the ex-employee would have to show that a particular employer would have hired him but for the retaliatory comments concerning his involvement in activity protected by Title VII." (emphasis added)). The issue of whether Johnston Pump would have hired Wilson is not at all relevant to whether L.B. Foster is liable for retaliatory discrimination. *See Hashimoto v. Dalton*, __ F.3d __, 1997 WL 366013, at *3 (9th Cir. 1997)("There is little question that the dissemination of adverse employment references can constitute a violation of Title VII if motivated by discriminatory intent. Thus, it is beside the point that Lowery's dissemination of the negative job reference was not the reason Hashimoto did not get the job with the Army." (internal quotations and citation omitted)); *Smith v. Secretary of Navy*, 659 F.2d 1113, 1120 (D.C. Cir. 1981)("An illegal act of discrimination whether based on race or some other factor such as a motive of reprisal is a wrong in itself under Title VII, regardless of whether that wrong would warrant an award of [damages].").

protected activity and does not preclude the EEOC from having established a prima facie case as to Minor's attempt to retaliate for the threat. Wilson's purported change of heart may have been relevant to the district court's ultimate determination that the EEOC's evidence was not sufficient to prevail on that claim, but it does not establish that the claim itself was frivolous or unfounded.

The EEOC presented evidence that Minor had personally given telephone references to prospective employers when they called about former employees, and these references went beyond merely providing dates of employment. App. at 293. In fact, such telephone references seemed a matter of course until Johnston Pump sought one for Wilson.[5]

In addition Wilson's protected activity and Minor's refusal to provide a reference are sufficiently close together to allow a reasonable fact finder to find the required element of causation. *See Kachmar*, 109 F.3d at 177 ("Cases in which the required causal link has been at issue have often focused on the temporal proximity between the employee's protected activity and the adverse employment action, because this is an obvious method by which a plaintiff can proffer circumstantial evidence 'sufficient to raise the inference that her protected activity was the likely reason for the adverse action.' ").

Nevertheless, the district court concluded that "[b]ecause Foster provided a telephone reference which confirmed Wilson's dates of employment, and it is undisputed that Minor would have given Wilson a poor recommendation due to the circumstances under which she left, plaintiffs have not established that Foster took adverse action against Wilson." App. at 588. However, given the inconsistencies in Minor's testimony, the company's conduct on behalf of other employees, and the temporal proximity of Wilson's threat and Minor's refusal to provide a reference, the EEOC's allegation of illegal retaliation is clearly not

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5. The district court found that Minor provided such references for only two types of employees, those who had previously informed Minor that they had given his name as a reference and those employees who had been laid off in 1986. App. at 577. Minor's own testimony, however, does not suggest these limits. *See* app. at 293.

frivolous. *See Clark v. Township of Falls*, 890 F.2d 611, 618-19 (3d Cir. 1989)("[A] wide panoply of adverse employment actions may be the basis of employment discrimination suits under Title VII of the Civil Rights Act . . . .").

We offer no opinion on whether this evidence was sufficient to carry the day but merely point out that it was enough to establish a prima facie case of retaliatory discrimination. Accordingly, we conclude that there was some factual basis for the EEOC's retaliation claim, and the district court therefore abused its discretion in awarding L.B. Foster its fees on that claim. *See EEOC v. Reichhold Chems., Inc.*, 988 F.2d 1564, 1572 (11th Cir. 1993)(concluding that, where plaintiff met her initial burden of establishing a prima facie case of retaliatory discrimination, "[that claim was] not frivolous and the district court abused its discretion in awarding fees against the EEOC").

C. Request for Back Pay

The district court's only explicit finding of frivolity related to the EEOC's request for back pay. *See* Addendum at 4. The EEOC contended that "Wilson was entitled to full back pay for the post-resignation period because she would not have left her job if not for the discriminatory denial of promotion."[6] Appellant Br. at 26. The district court regarded this contention as frivolous since Wilson was not constructively discharged. *See* Addendum at 4 ("The EEOC's arguments that Wilson was entitled to back pay even though she was [not] constructively discharged were frivolous.").

The constructive discharge rule to which the court was referring provides that "employees are entitled to awards

6. Originally, the EEOC sought back pay "based solely on the difference between the amount that Wilson would have received had she been promoted and the amount that she made as regional credit manager." Appellant Br. at 26. It later amended its request to conform to Wilson's requested relief for the full amount she would have received as regional credit manager had she not resigned. *See* Appellant Br. at 26.

such as back pay past the date of resignation and reinstatement only if they were actually or constructively discharged from their employment." *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 758 F. Supp. 303, 307 (E.D. Pa. 1991), *rev'd*, 983 F.2d 509 (3d Cir. 1992). The rationale behind this rule is that " 'society and the policies underlying Title VII will be best served if, wherever possible, unlawful discrimination is attacked within the context of existing employment relationships.' " *Id.* Courts of appeals "have been nearly unanimous in their application of the constructive discharge rule, whereby victorious Title VII plaintiffs who have left their employment with the defendant but who were not constructively discharged by the defendant are only entitled to a remedy covering the period during which the discrimination occurred up to the date of resignation." *Id.* at 306. However, one court of appeals has held that a back pay award is proper, whether or not the employer was constructively discharged, when the employee "end[s] his employment for reasons beyond his control, reasons which were causally linked to the [employer's] wrongful denial of a promotion." *Wells v. North Carolina Bd. of Alcoholic Control*, 714 F.2d 340, 342 (4th Cir. 1983)(upholding back pay award to employee who terminated his stock-clerk position after he was wrongfully denied a promotion to sales clerk and his employer refused his request for lighter duties to accommodate a work-related back injury); *see also Helbling v. Unclaimed Salvage & Freight Co., Inc.*, 489 F. Supp. 956, 963 (E.D. Pa. 1980)(rejecting notion that the back pay award to an employee discriminatorily denied a promotion on the basis of her gender should terminate on the date of her resignation)("The back pay award, therefore, must be based on the period running from the date she should have been promoted to manager to the date the store closed — the period it can be assumed she would have held the job to which she was entitled.").

This Court has not yet taken a position under the circumstances here where the claim of constructive discharge is absent. We have merely recognized that "[c]lassifying a termination as a constructive discharge rather than a voluntary quit has significant ramifications with respect to the scope of relief." *Goss v. Exxon Office*

Sys. Co., 747 F.2d 885, 887 (3d Cir. 1984). Since we have not yet ruled on this precise issue and since one of our sister courts of appeals has ruled that back pay would be recoverable under the facts alleged by the EEOC, the district court's determination that the EEOC's request for back pay was frivolous cannot stand.

V.

For the reasons set forth above, we will reverse the district court's order dated June 20, 1996 granting L.B. Foster its attorney's fees.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND JO ANN WILSON, *Plaintiff,*	)	
vs.	)	Civil Action No. 90-0758
L.B. FOSTER COMPANY, *Defendant.*	)	

ORDER OF COURT

June 20, 1996

It is hereby **ORDERED** that judgment in the total amount of $142,628.50 for counsel fees and costs in favor of L. B. Foster Company and against Equal Employment Opportunity Commission is hereby entered as follows:

1. The reasonable fees for defense of the claim of sex discrimination brought by the Commission amount to $80,380.75;

2. The reasonable fees for defense of the claim of retaliation brought by the Commission amount to $46,588.00;

3. The reasonable fees for litigation the fee petition, from September 15, 1994 to December 20, 1995, amount to $15,659.75.

4. The reasonable costs to Foster in litigating the fee petition to date include $1,147.07 for the Special Master.

By Order dated March 18, 1996, the Court instructed that the Special Master's statement for professional services and costs be paid on or before April 17, 1996. The Court further instructed that payment be made equally by the Commission and Foster. The Court has been informed that, to date, the Special Master has not received payment from the Commission. The parties and their counsel are advised that the Court's Order of March 18, 1996, remains in full force and effect.

/s/ Donald J. Lee

Donald J. Lee
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
JO ANN WILSON,	)	
Intervenor-Plaintiff,	)	
	)	
vs.	)	Civil Action
	)	No. 90-0758
L.B. FOSTER COMPANY,	)	
Defendant.	)	

PRELIMINARY FINDINGS OF FACT
AND CONCLUSIONS OF LAW

July 14, 1995

By Order dated May 1, 1995, the Court, pursuant to Fed.R.Civ.P. 54(D), referred the issues relating to the value of services rendered by defendant's counsel to Howard K. Hilner, Esquire, as Special Master pursuant to Fed.R.Civ.P. 53.

The defendant, L.B. Foster Company, thereafter filed a motion for clarification of the order referring issues to Special Master stating that in a telephone conference with Special Master Hilner, he indicated it was his understanding that he (i) should determine whether the underlying action was meritless, frivolous, unreasonable, or without foundation, and (ii) if the answer to the first part is in the affirmative, to determine the reasonable amount of attorneys' fees to which defendant is entitled.

In connection with said referral, the Court makes the following preliminary Findings of Fact that the defendant, L.B. Foster Company, is a prevailing defendant who is entitled to attorneys' fees pursuant to *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 98 S.Ct. 694 (1978).

Preliminary Findings of Fact

1. Plaintiff Equal Employment Opportunity Commission ("EEOC") originally filed this action against defendant L.B.

Foster Company ("Foster") in which the EEOC alleged that Foster discriminated against Jo Ann Wilson on the basis of her age and sex by failing to promote her to the position of Corporate Credit Manager in violation of the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964. The EEOC also alleged that Foster retaliated against Ms. Wilson in violation of Title VII when it did not provide an employment reference for Ms. Wilson because she had complained about sex discrimination.

2. Thereafter, Ms. Wilson intervened as plaintiff and asserted the same claims as the EEOC, and added additional claims that Foster violated the Equal Pay Act and constructively discharged Ms. Wilson in violation of Title VII and the ADEA on account of her age and sex. After the parties conducted written discovery and depositions, both the EEOC and the defendant moved for summary judgment.

3. By Order dated December 18, 1991, the Court granted partial summary judgment in favor of Foster on the claims for constructive discharge and violation of Equal Pay Act.

4. On November 9, 1992, EEOC filed a motion for leave to amend its expert report to calculate the intervenor's "back pay" as the difference between what she would have earned at L.B. Foster as, corporate credit manager, and her actual earnings subsequent to her resignation. In this motion to amend, the EEOC sought license to use the same method of calculation already proposed and advanced by the intervenor.

5. On the last business day before a jury trial was to commence in this action, plaintiffs dismissed the claim under the ADEA, and the case was tried non-jury before the Court on the promotion and retaliation claims under Title VII.

6. A non-jury trial of this case was conducted on November 16 through November 19, 1992, and on July 19 and July 20, 1993. At the close of plaintiffs' case, Foster filed a motion for judgment as a matter of law on the grounds that plaintiffs did not establish a *prima facie* case of retaliation in violation of Title VII, as they did not prove that Ms. Wilson would have been hired by a subsequent employer if she had been given a reference by Foster.

7. The parties submitted extensive findings of fact and conclusions of law in November and December 1993.

8. EEOC's motion for leave to amend expert report was denied June 2, 1994, on the grounds that Ms. Wilson was not constructively discharged. However, on June 7, 1994, the Court vacated that Order because of the decision of the United States Court of Appeals for the Third Circuit in *Charlton v. Paramus Board of Education, et al.*, 25 F.3d 194 (3d Cir. 1994) and directed the parties to submit briefs on the effect of *Charlton* on the matters treated in the Court's Memorandum Opinion of June 2, 1994.

9. Foster's motion for judgment as a matter of law was granted by Order dated September 13, 1994. The findings of fact and conclusions of law set forth in the September 13, 1994, Order are incorporated by reference.

10. By Order dated September 13, 1994, the Court entered judgment in favor of Foster on the remaining claim in the action, finding that Ms. Wilson was not denied promotion to corporate credit manager on account of her sex.

11. The primary claim in this litigation was the sexual discrimination claim. However, the EEOC's retaliation and back pay claims are closely connected to the sexual discrimination case.

12. The Court did specifically find that the plaintiffs had established a *prima facie* case of failure to promote on the basis of gender.

13. However, EEOC and the intervenor failed to adduce any evidence of sexual discrimination. On the contrary, the evidence clearly and convincingly established that there was no sexual discrimination involved in Foster's failure to promote the intervenor.

14. The EEOC failed to adduce evidence to support the retaliation claim and failed to adduce evidence that the intervenor would have been hired by a prospective employer had she been given a reference.

15. The EEOC's arguments that Wilson was entitled to back pay even though she was constructively discharged were frivolous.

Preliminary Conclusions of Law

1. Pursuant to the judgment in this action entered on September 13, 1994, Foster is the prevailing party in this action within the meaning of 42 U.S.C. § 2000(e)-5(k).

2. Title VII provides in relevant part that "[i]n any action or proceeding under this subchapter the Court, in its discretion, may allow the prevailing party . . . a reasonable attorneys' fee as part of the costs. . . ." 42 U.S.C. § 2000(e)-5(k).

3. The standard used to determine whether a request for attorneys' fees by a prevailing defendant should be approved is stated in *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421, 98 S.Ct. 694 (1978): "a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, and without foundation, even thought not brought in subjective bad faith."

4. In enacting the attorneys' fee provision of Title VII, Congress had two purposes: to make it easier for a plaintiff of limited means to bring a meritorious suit and second, and equally important, Congress intended to deter the bringing of lawsuits without foundation. *Christiansburg*, 434 U.S. at 420.

5. A prevailing defendant is entitled to attorneys' fees upon a finding that the plaintiff's action was meritless, frivolous, unreasonable, or without foundation, even if it is not brought in subjective bad faith. *Quiroga v. Hasbro., Inc.*, 934 F.2d 497, 503 (3d Cir.), *cert. denied*, 112 S.Ct. 376 (1991).

6. The reasonable hourly rate to be applied in a civil rights case is the prevailing market rate in the relevant community for similar work. *Blum v. Stenson*, 465 U.S. 886, 894, 104 S.Ct. 1541 (1984).

7. Absent extraordiary circumstances, the "reasonable value of any attorney's time is the price that time normally commands in the marketplace, which is generally reflected in

the attorney's normal billing rate." *Student Public Interest Group of New Jersey, Inc. v. AT&T Bell Lab.*, 842 F.2d 1436, 1445 (3d Cir. 1988).

8. Fees for paralegals and clerks are properly recoverable under Title VII. *David v. AM Intern.*, 131 F.R.D. 86, 90 (E.D. Pa. 1990).

9. It is proper to permit recovery of attorneys' fees for more than one attorney so long as there is no duplication of effort. *Id.*

10. Cases that are ultimately viewed as frivolous for purposes of assessing counsel fees under Title VII may survive motions to dismiss under a system of notice pleading that does not require factual detail and motions for summary judgment as to which evidence may be presented in a sketchy fashion and credibility may not be taken into account. *Greenberg v. Hilton Intern. Co.*, 870 F.2d 926, 940 (2d Cir. 1989).

11. Counsel are properly compensated for time spent litigating a fee petition. *Keenan v. City of Philadelphia,* 55 FEP 932 (E.D. Pa. 1991), aff'd in part, rev'd in part and vacated in part, 983 F.2d 459 (3d Cir. 1992).

12. Attorneys may be compensated at their current rates, rather than historical rates, in recognition of the delay in payment between when work was performed and fees paid. *Missouri v. Jenkins by Agyei,* 491 U.S. 274, 283, 109 S.Ct. 2463 (1989). This principle is equally applicable to an award of fees to a prevailing defendant who has paid the attorneys' fees on a regular basis throughout the course of the litigation.

13. The EEOC's action, including the retaliation and back pay claims, was meritless, frivolous, unreasonable and without foundation.

Conclusion

The Court's Order of May 1, 1995, will remain in full force and effect. However, in addition, the Court will enter an Order directing the Master, in making his report as to the attorneys' fees to which he finds defendant to be entitled, to be allocated as to the following categories:

(a) The primary sexual discrimination claim;
(b) The retaliation claim;
(c) The back pay claim.

Lee, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and JO ANN WILSON, *Plaintiffs,*	)	
vs.	)	Civil Action No. 90-0758
L.B. FOSTER COMPANY, *Defendant.*	)	

MEMORANDUM OPINION

September 13, 1994

Introduction

The plaintiff, Equal Employment Opportunity Commission ("EEOC"), originally filed this Title VII action for alleged sex discrimination on the part of the defendant, L.B. Foster Company ("Foster"), because of its failure to promote the charging party, Jo Ann Wilson ("Wilson") to the position of corporate credit manager.

Thereafter, Wilson intervened as plaintiff.

The matter was tried non-jury before the Court and the parties submitted Proposed Findings of Fact and Conclusions of Law. On June 2, 1994, the Court entered a Memorandum Opinion disposing of the following matters:

1. Motion of Defendant, L.B. Foster Company, to Dismiss Plaintiff-Intervenor's Retaliation Claim (Document No. 64);
2. Motion of Defendant, L.B. Foster Company, to Dismiss Retaliation Claims (Document No. 66);
3. Plaintiff Equal Employment Opportunity Commission's Motion for Leave to Amend Expert Report (Document No. 70); and
4. Motion of Defendant, L.B. Foster Company, for Judgment as a Matter of Law (Document No. 72).

(Memorandum Opinion, June 2, 1994, Document No. 100).

However, less than 24 hours after the Court's Memorandum Opinion was published, the decision of the United States Court of Appeals for the Third Circuit in *Charlton v. Paramus Bd. of Educ., et al,* 25 F.3d 194 (3d Cir., June 1, 1994) was published by Westlaw and came to the Court's attention. By Order of June 7, 1994, the Court vacated its Memorandum Opinion of June 2, 1994 (Document No. 101) and directed the parties to file memoranda with regard to the effect of the decision in *Charlton.*

Following the filing of its "Brief on the Effect of the *Charlton* Decision on the Court's June 2, 1994, Order," the EEOC filed a letter supplement on July 12, 1994, calling the Court's attention to the Third Circuit Court of Appeals Opinion in *Miller v. Cigna Corp.,* __ F.3d __, 1994 WL 283269, 65 Fair Empl. Prac. 268 (3d Cir., June 28, 1994), asking the Court to consider *Miller*, in deciding the motions currently before the Court.

The Court notes that by Order of August 12, 1994, the Third Circuit vacated the panel's opinion and judgment previously filed and listed *Miller* for rehearing in banc. *Miller v. Cigna Corp.,* 1994 WL 420284 (3d Cir. 1994).

The Court makes the following Findings of Fact and Conclusions of Law which will effectively dispose of all pending matters and motions in this proceeding.

Findings of Fact

A. Background

1. Foster is engaged in the manufacture and sale of rail construction and tubular products.

2. Wilson was employed by Foster in various positions from 1980 to her resignation on January 30, 1988.

3. Prior to 1986, Foster's credit function was decentralized and many tasks were performed by employees in various regions throughout the country, including Atlanta, Houston, Chicago and San Francisco.

4. Prior to her employment with Foster, Wilson worked for Dillard Paper Company of Birmingham, Alabama, from 1961 through 1972, starting as a secretary but moving to bookkeeping, inventory control and credit management.

5. Dillard was a wholesale paper distributor that sold primarily to businesses, such as printing companies.

6. As credit manager, Wilson investigated credit ratings, made decisions as to whether credit should be extended, had all collection responsibility, supervised a bookkeeper, and reported to the general manager.

7. Wilson was then hired by Liberty Trouser company of Birmingham, Alabama, to establish an in-house credit department.

8. Wilson worked at Liberty Trouser Company for eight years, gathering credit information, creating credit files, writing credit policies, coordinating factoring of accounts with the bank, and operating the department.

B. Wilson's Employment History

9. Wilson was initially employed by Foster on November 18, 1980, as an assistant credit manager in Houston, Texas, at a salary of $1,833 per month.

10. Effective June 1, 1981, Wilson was promoted to assistant credit manager in Houston. She received 9% salary increase, to $2,000 per month.

11. Effective February 1, 1982, Wilson was promoted to Houston Division credit manager. She received 25% salary increase, to $2,500 per month.

12. Effective February 1, 1984, Wilson received a 12% salary increase, to $2,800 per month.

13. Effective December 1, 1984, Wilson was promoted to the position "Credit Manager" and from exempt level 7 to exempt level 11. She received a 25% salary increase to $3,500 per month.

14. David Minor ("Minor") worked with Jerry Fields who, until January 1985, was Vice President, Tubular Products, for the Houston Division, and Minor recommended that Wilson be promoted to credit manager.

15. Effective July 1, 1985, Wilson received a 5% merit increase, to $3,675 per month. This increase was approved by Minor.

16. Effective April 1, 1986, Wilson received a 6% merit increase, to $3,896 per month.

17. Effective January 1, 1988, Wilson received a 6^ merit increase, to $4,128 per month.

18. Wilson did not have a college degree.

19. Wilson's post-high school education consisted of two courses at Houston Community College, one in supervisory management and one in freshman English, and three courses at the National Institute of Credit which lasted two nights per week for six weeks.

20. Wilson assumed the responsibilities of the credit manager position in Houston in February of 1985 when the incumbent in that position, Jane Krahl, passed away. Wilson did not compete for this position with any internal or external applicants.

C. Minor's Employment History

21. Minor was hired by Foster as corporate credit manager in May 1983. He reported to Treasurer and Chief Operating Officer Thomas Upchurch.

22. Minor had a B.S. degree in business and finance from the University of Pittsburgh and did graduate work at Williams College in Massachusetts.

23. Minor was promoted to Assistant Treasurer in December 1987 and assumed the position of Treasurer in March of 1988.

24. Minor had 18 years of credit experience with Jones and Laughlin Steel Corporation prior to joining Foster.

25. Minor was hired to improve the operation of credit which included looking at Foster's credit organization and recommending restructuring.

26. After Minor assumed responsibility for the Houston Credit Division in 1985, Minor had a direct role in pay

increases for employees in that division, including Wilson, and prior to 1985 conferred with Jerry Fields.

27. In his capacity as corporate credit manager, Minor formally reviewed Wilson's performance in an Employee Development Review dated July 15, 1985.

28. Wilson's 1985 review notes the following under areas where performance fell short of goals, standards or expectations: "Needs to improve on presentation of accounts — needs to be complete; needs to learn to manage people more effectively — matter of experience."

29. Wilson's 1985 review notes the following under ways to improve current job performance: "Needs to have all facts and papers in front of her prior to calling to Corporate Credit Manager. Schedule regular meetings with staff."

30. Minor made these comments because when Wilson called Minor on presentations over the phone, she would not always have all of the facts together. Minor would ask her to go back and compile the information and then come back to him with a recommendation or discussion. Minor considered this to be a significant problem with her credit presentations.

D. Steven Ward Hahn's Employment History

31. Steven Ward Hahn ("Hahn") has an undergraduate degree in graphic arts from East Texas State University. He has an M.S. degree in graphic arts from Ohio State University. He has six full years of post-high school education.

32. Hahn's college courses included a core curriculum of English, history, math, sciences, various electives and work towards his major.

33. Hahn has attended numerous Dun & Bradstreet seminars, seminars by the National Association of Credit Management including techniques of extending credit, collection of accounts receivable, financial analysis seminars and support credit seminars.

34. Hahn's first credit job was in 1978 with Republic Supply Company in Oklahoma City where he was one of four area credit managers. Republic's main product was oil country

tubular goods and in some cases sold to the same customers as Foster. Hahn established lines of credit, gathered information necessary to make a credit determination, and was responsible for collecting receivables from customers within his area of responsibility.

35. Republic was larger than Foster.

36. In 1982 Hahn left Republic to assume the position of credit manager at Sterling Pipe & Supply Company. Sterling supplied equipment, some of it purchased from Foster, to the oil and gas industry. Sterling and Foster shared some common customers.

37. Hahn established the credit department at Sterling and established credit procedures. He was also responsible for issuing credit to customers and for collection of the accounts receivable. When the oil and gas industry collapsed, Hahn's duties shifted to collection of receivables. He filed liens, served on bankruptcy and pre-bankruptcy creditors' committees. Hahn negotiated with customers, banks and attorneys.

38. Sterling Supply Company was a distributor of oil country goods located in Oklahoma City, Oklahoma.

39. Sterling was a customer of Foster, and prior to June of 1985, Sterling owed Foster in excess of $2 million.

40. The Houston Division of Foster granted credit to Sterling. Therefore, the Sterling account and potential bad debt was the responsibility of the Houston credit region.

41. Minor, as corporate credit manager, was instructed to look at Sterling's accounts, evaluate the accounts, and have reporting done directly to him. Foster had an interest in Sterling's cash flow because Foster was attempting to acquire Sterling or obtain new financing for Sterling in order for Foster to collect as much on the potential bad debt as possible.

42. Sterling supplied equipment to the oil and gas industry and some of the pipe was purchased from Foster. In some cases, Sterling and Foster shared common customers. Sterling and Foster both were in the business of oil field products.

43. Hahn established the Credit Department at Sterling.

44. During the course of Hahn's employment with Sterling, his responsibilities shifted more from the extension of credit to collection of receivables. He filed liens, served on creditors' committees, both in bankruptcy and previous to bankruptcy, in an effort to keep them out of bankruptcy, negotiated with customers, met with banks and negotiated settlements with attorneys for customers.

45. Sterling's customers were end users of the products, who were the operators of the oil and gas wells.

46. Sterling's bad debts were not due to the fault of Hahn. The President of Sterling, Joe McEuen, extended credit to customers who had enormous balances that were dramatically past due. McEuen took these actions even after Hahn had declined credit to various customers who were friends of McEuen.

47. Hahn became involved with Minor several months after Minor came to Foster in 1983 when Minor and Jan Krahl traveled to Sterling for the purpose of meeting Sterling employees, to review the status of the accounts receivable and to become knowledgeable about Sterling's problematic receivables.

48. Foster acquired Sterling in June 1985.

49. Hahn became employed by Foster in June 1985 when Sterling became a subsidiary of Foster. Minor was involved in the decision to terminate the employment of the other Sterling Credit Department employee, John Hough, a male.

50. Foster had a large number of bad debts arising out of the Houston region. One was Seaboard Pipe and the other was Sterling.

51. Minor was impressed with Hahn on his first visit. Hahn was prepared for Minor's visit, had materials ready and organized, prepared an excellent presentation and answered virtually all of Minor's questions.

52. Hahn worked with Minor prior to the acquisition of Sterling, kept Minor advised of problematic accounts and sought Minor's approval to settle accounts.

53. Minor had continuous involvement with Hahn from mid-1984 up until the time Foster purchased Sterling in June 1985. During this time period Hahn sent reports directly to Minor on items such as sales, outstanding trial balances and cash receipts.

54. Credit authorization for end users such as Sterling was much riskier than for customers of Foster.

55. Minor also worked extensively with Hahn prior to June 1985 because Foster was thinking about selling to end users of tubular goods, and Minor wanted to learn that business from Hahn.

56. Hahn continued to report to Minor after the acquisition in May 1985. Hahn's duties did not change after the acquisition.

57. Hahn's job description after the acquisition of Sterling reflects that he had a credit authorization of $100,000.

58. Because Foster and Sterling sold to some of the same accounts, Minor asked Hahn to coordinate on those accounts with the Foster Credit Department in Houston after the acquisition of Sterling.

59. Minor encouraged Hahn to coordinate with the Credit Department in Houston.

60. At some point after mid-1984, Sterling no longer had a Dun & Bradstreet subscription. Hahn called to Foster's Credit Department in Houston to receive Dun & Bradstreet reports.

61. Hahn was never required to obtain credit authorization from Wilson or Beth Moore.

62. After the acquisition of Sterling, Hahn performed the job responsibilities set forth on the job description admitted as Company Exhibit CC.

63. After the acquisition of Sterling by Foster, Hahn's credit authorization was $100,000. A $100,000 credit authorization was sufficient to take care of 99% of Hahn's orders because of Sterling's dwindling business due to a drastic fall in sales. It did not reflect Hahn's ability to approve large orders.

E. Centralization of Credit Department

64. Foster's Credit Department was centralized and reorganized in late 1986. The reorganization was due to difficult financial circumstances which made it necessary to reduce budgets significantly.

65. In connection with the reorganization and consolidation, Minor was told that he could select only two employees to come to the corporate headquarters in Pittsburgh. The recommendation was up to Minor.

66. Minor narrowed his choice to those whom he described as "three of the most capable people within the organization" — Nancy Dean (female) from Atlanta, Jo Ann Wilson (female) from Houston, and Steve Hahn (male) from Foster's Sterling Division.

67. Because Minor felt that it was important to bring one person from Atlanta and one person from Houston due to their familiarity with the majority of accounts, he offered the position in Pittsburgh first to Nancy Dean, female, the Credit Manager in Atlanta, and then to Wilson.

68. Dean declined to come to Pittsburgh for personal reasons.

69. Minor offered the transfer to Wilson because of her knowledge of the accounts in Houston. Wilson was offered the transfer by telephone on October 24, 1986.

70. Minor asked Wilson to respond by November 3, but she asked, and Minor agreed, to extend the deadline to November 5.

71. On October 31 by telephone Minor offered Hahn a transfer to Pittsburgh because he had the qualities and qualifications that Minor needed. Minor had worked with Hahn since Minor came to Foster, had seen Hahn's work product, reviewed reports coming back and forth on a regular basis and had a great deal of interaction with Hahn.

72. Minor offered the transfer to Pittsburgh to Hahn and Wilson on the same terms: he told them about the risk involved in transferring to Pittsburgh, the financial problems

which Foster was in at that time, the fact that he could make no promises about longevity in the job, and the fact that there would be no pay increases.

73. Minor did not view any of the candidates (Dean, Wilson or Hahn) as more qualified than anyone else. Minor did not rank, the people in terms of qualifications, only in the fact that he needed their account experience.

74. Hahn accepted Foster's offer of a transfer to the Credit Department in Pittsburgh on November 4, 1986.

75. Hahn talked to Wilson about the position in Pittsburgh after he had accepted the transfer and inquired about whether or not she was coming to Pittsburgh.

76. Wilson and Hahn reported to Pittsburgh in December 1986. Wilson's salary was $3,896 per month. Hahn's salary was $3,450 per month. Minor was not permitted to change their salaries when they moved to Pittsburgh.

77. Prior to centralization of the Credit Department in 1986, there was a great deal of disparity in the salaries throughout the regions.

78. Hahn's salary was lower than Wilson's because he worked for Sterling which was a financially distressed company.

79. On the other hand, the Houston Region had had some very successful years when they went through the boom of the oil industry. The Houston Region did a very good job in making money for Foster and the salaries in Houston were higher than other regions of Foster.

80. In connection with the reorganization, Minor terminated the employment of all other individuals in the Credit Department beside Wilson and Hahn. He terminated the employment of seven or eight other Credit Department persons, two of whom were males: Barry Watson and Joe Brooks.

81. Despite pressure to eliminate the position of a female employee, Eileen Roberts, the Credit Department manager in the San Francisco office, Minor fought to save Roberts' job and was successful.

82. In connection with the general termination of the regional credit office, Beth Moore's employment was terminated in November 1986.

83. Moore subsequently came to Pittsburgh. Minor had an opening in the Credit Department in Pittsburgh for a credit analyst, and Wilson approached Minor and recommended Moore because of her experience at the Houston credit office. Minor hired Moore at Wilson's suggestion.

84. The company's standard relocation package provided temporary living expenses, house hunting expenses, one month's salary for incidentals, movement of household goods, and use of a third-party home buying service which covered closing costs at both ends.

85. Because Wilson would have had to take a loss on her home in Houston in order to move to Pittsburgh, Foster offered her a special relocation package and loaned her $8,500.

86. Wilson countersigned a lettre of agreement from Thomas A. Upchurch, Chief Financial Officer, together with a promissory note on January 12, 1987 (Exhibit W8) in which it was agreed that the company would discharge Wilson from any and all obligations with respect to the promissory note if she remained a full-time employee of Foster until January 1, 1989, unless her termination of employment was involuntary. If Wilson ultimately sold her house in Houston, the closing costs would offset the loan. Terpenning informed Wilson that she had until March 1988 to take advantage of this offset. Wilson received everything except the home buying service.

87. Wilson did not have an oral agreement with Minor that if she worked for Foster for one year that the loan of $8,500 would be completely forgiven.

88. The letter agreement and promissory note executed by Wilson memorialized completely the agreement between Wilson and Foster and there were never any subsequent modifications or changes to the agreement.

89. Minor had approached Upchurch on behalf of Wilson to secure this loan for her.

90. The company has never advanced any other employee money in order to relocate.

91. Because of the depressed real estate market in Oklahoma, Hahn was not able to sell his home at a profit. The company did not offer to loan Hahn money in connection with his relocation.

92. After their transfer to Pittsburgh in early December 1986, Hahn and Wilson both held the position of regional credit manager.

F. Minor's Evaluations of Hahn and Wilson as Regional Credit Managers

93. Hahn and Wilson had the same responsibilities as regional credit manager. Minor divided the accounts between them equally, depending upon a number of factors such as type of product within a district, difficulty of handling a district, size of district, volume of district and sales manager.

94. Minor evaluated the workload between Wilson and Hahn on a regular basis.

95. In late 1986 and 1987, Foster entered into a loan transaction with Mellon Bank under which Foster sold its accounts receivable to Mellon in exchange for funds. The interest charged by Mellon on the actual sales of receivables was based upon the forecasted collections.

96. The regional credit managers assisted Minor with completing paperwork for Mellon. The company had to report cash to Mellon on a daily basis. Both Hahn and Wilson assisted Minor and the company never missed a deadline.

97. Wilson was familiar with the company's paperwork and forms because of her work in Houston. Hahn was not familiar with the forms used by the company and Wilson and others initially assisted him become familiar with the forms used by the company. Wilson did not train Hahn on his regional credit manager position.

98. After the centralization of the Credit Department, Minor was not familiar with the forms used in the regions, and others assisted Minor become familiar with the forms.

99. Hahn and Wilson worked closely together as regional credit managers. It was normal for them to interact on a daily basis. Minor encouraged this.

100. Minor interacted with Wilson on a regular basis when she was in Houston and on a daily basis after she was transferred to Pittsburgh.

101. Regional credit managers were required to make oral "Credit Presentations" at any time they required assistance. Regional credit managers were required to give Minor a written presentation at any time they had an order or an exposure of an account beyond their credit authorization. Wilson's credit presentations were below Minor's expectations. Minor required that credit managers come to him with complete files and present to him their recommendations as well as the information in the file. There were often times when her files were not organized. There were times when Wilson would put a file on Minor's desk and say, "What do you think of this." This required Minor to review the file, to bring himself up to speed on the information. There were many times when Minor asked Wilson to take the file back and present it to him in the proper manner.

102. Minor advised Wilson on a number of occasions that he was not pleased with her credit presentations.

103. Wilson's organizational skills were below Minor's expectations. There were times when certain documents and certain information which needed to be in the credit files was not in the files.

104. Minor made Wilson aware of problems with her file organization on a number of occasions.

105. In Minor's opinion, Wilson did not have strong analytical skills. From Minor's constant review of Wilson's credit files and credit litigation files, he had a very good opportunity to look at the accounts. Wilson's financial analysis skills were not strong.

106. Financial analysis skills were not a factor in Wilson's performance as regional credit manager, but it was one of her shortcomings.

107. Wilson frequently took lunch breaks which extended past the company's one-hour lunch break period. These lunch breaks were not "business lunches."

108. Wilson frequently arrived late for work in the morning.

109. Company management, especially Chief Executive Officer Joseph Dugan, was very strict about starting times and lunch hours. Dugan once insisted that the offices of Foster leave a business luncheon in the middle of a speaker to get back to the office within an hour. Dugan criticized officers and salaried employees for taking long lunches and arriving late in the morning.

110. Wilson's late lunches and late arrivals were a significant concern to Minor. It was important to Minor that Wilson set an example as a manager. Because credit was a service to salespeople, product managers and management, it was important for Wilson to be on time for their convenience and Minor's purposes.

111. Minor discussed with Wilson her problems in arriving on time on a number of occasions.

112. Minor received a number of complaints about Wilson's late arrivals while she was in Pittsburgh and also while she was in Houston.

113. Minor received a complaint from Bob Shaefer, Vice President of Retail Products, about Wilson and Barry Watson not arriving in the morning on time in Houston. Wilson received a copy of Shaefer's memorandum.

114. Minor was critical of Wilson because she did not abide by the company policy on work hours, not because she did not put in sufficient hours to get her job done.

115. Wilson's own witness Beth Moore Corbett, testified that Wilson's late arrivals bothered Minor a great deal.

116. Wilson often took lunches with her subordinates. This magnified the problem of late lunches for Minor because it set a bad example to others in the department and it meant that a region or part of a region was not being covered to service the company.

117. Minor observed Wilson handling telephone conversations with customers or salespersons. Her manner was not professional in a number of cases. Minor observed Wilson being loud, very condescending, very brash and unprofessional.

118. Minor received complaints from customers as well as individuals within the company about Wilson's telephone mannerisms and interactions with others.

119. Minor had an opportunity to observe Hahn and Wilson equally. In fact, he was probably more familiar with Hahn's work.

120. Hahn's management style was very professional. His mannerism an way of managing people was excellent.

121. Hahn arrived very early for work and was prompt and on time on lunch hours.

122. Hahn's credit presentations were very good. Hahn's presentations were very well constructed. He had the information that was necessary and on most occasions he had recommendations for Minor.

123. Hahn was very strong in financial analysis. Because of his exposure on difficult accounts, he was very strong in the analytical part of the job.

124. Hahn's interactions with customers and salespeople was very professional and appropriate for the situation. He was not condescending or brash.

125. Hahn was very strong in financial analysis. Minor was exposed to many of Hahn's accounts and was able to evaluate that Hahn was strong in the analytical part of the job.

126. Hahn's interactions with customers and sales representatives was professional and appropriate for the situation.

127. Minor never required credit personnel to turn around orders in one day. A large percentage of accounts did not ship in one day. The company required manufacturing and fabrication time.

128. Wilson and Hahn had different styles with respect to credit. Wilson was an order-giver, that is, she directed her subordinates by giving orders. Hahn emphasized interaction and

discussion. He would try to make the district credit managers come up with a recommendation or a decision.

G. Wilson's Stated Intentions to Return to Houston

129. After her move to Pittsburgh, Wilson commented to Minor on many occasions that she missed Houston.

130. Wilson comments to Hahn on numerous occasions that she was not happy living in Pittsburgh, she did not like the weather or the people in Pittsburgh. Wilson told Hahn that she missed Houston, had a nice home there, and intended to return to Houston. Wilson made these feelings known to others in the Credit Department as well.

131. Wilson came to Minor in late 1987 and told him that she had made a decision to leave Pittsburgh and that she was going back to Houston. Wilson told Minor that she expected to leave in April of 1988. She had renters in her home in Houston and their lease was expiring in April of 1988. Wilson's lease in the house she was renting in Pittsburgh expired about the same time, and consequently, she felt that April was the best time for her to go back to Houston.

132. Minor told Wilson that he was disappointed to hear that she would leave Pittsburgh and told her that according to the terms of the note, she would have to pay back the $8,500 loan. Wilson told Minor that she would not pay the note back.

133. The company held a Christmas party in early December 1987. Wilson and her husband were seated with Terpenning and her husband, President and CEO Joseph Dugan and his wife, and Al Martini, an officer of the company, and his wife. At the dinner table, Wilson said that she missed her family in Houston and planned to move back there in April of 1988.

134. In early December of 1987, on December 10 or 11, Minor was promoted from corporate credit manager to Assistant Treasurer.

135. Wilson spoke to Hahn after the Christmas party and told him that she had informed Dugan at the party of her intention to move back to Houston. Wilson remarked that

Dugan's wife was very sympathetic about Wilson's desire to be closer to her family. Wilson never told Hahn that she had changed her mind.

136. Shortly after Minor's promotion was announced, Wilson approached Minor and told him that she decided that she would not return to Houston. Minor was suspicious of Wilson's announcement, given the fact that it was extremely coincidental that her change of mind came shortly after it was announced that the corporate credit manager's job was now open. Wilson did not tell Minor that she changed her mind because of a conversation with Dugan nor did she ask Minor to inform Dugan about her change of Mind.

137. Wilson never told Terpenning that she had changed her mind about leaving Pittsburgh.

138. In early January 1988, Wilson told Carol Koss, District credit manager, that she did not like living in Pittsburgh, she wanted to return to Houston, but that she was waiting until a decision was made on the corporate credit manager position. Wilson conveyed to Koss that she ultimately was going to return to Houston, but she expected to get the promotion and wanted it on her resume for when she returned to Houston.

H. Corporate Credit Manager Hiring Decision

139. Because of Minor's promotion, a vacancy in the corporate credit manager position existed. Terpenning discussed the selection process with Minor before he interviewed any candidates. Minor indicated to Terpenning that there were two internal candidates, Wilson and Hahn, and also that he might want to go outside the company to fill the position. As was her practice, Terpenning discussed the company's equal employment opportunity policy with Minor, that the company did not discriminate on the basis of sex, handicap, marital status, national origin, religion, etc.

140. After the announcement of Minor's promotion, Wilson approached Minor and asked him when she was going to get her promotion. Minor told her that he would consider others as well as herself. Wilson responded "who else could that

be?" Wilson was very disturbed by the fact that Minor would consider persons other than herself for the corporate credit manager position.

141. The corporate credit manager was responsible for administering credit in the operation of Foster and its subsidiaries. The manager was responsible for the implementation of credit policies and practices, to assure the safety of the accounts receivable and to make sure that the turnover of accounts receivable was within the guidelines of company policy.

142. Special skills necessary for the corporate credit manger, as reflected on a position description dated February 10, 1986, are as follows: ability to understand and be able to expertly interpret financial and credit information, ability to correspond with customers and salespeople under difficult circumstances without causing alienation; complete knowledge of uniform commercial codes, financing arrangements, commercial contracts, bankruptcy, international trade, bond and lien laws, and various credit instruments; ability to manage as well as motivate subordinates and the ability to interact with management.

143. Minor met with Wilson on two occasions to discuss the promotion. During the first interview, sometime in January 1988, Wilson was very upset that Minor was considering Hahn. Minor asked Wilson to tell him about her qualifications for the job. Wilson responded that Minor should know her qualifications, Minor knew the work she did and how good she was and there was no need for her to expound upon her qualifications. At that point Wilson started to talk about Hahn's shortcomings and criticized Hahn. Minor told Wilson that he did not want to hear about Hahn, he was here to talk about Wilson. But Wilson continued to attempt to criticize Hahn. Minor continually asked her not to do that. Wilson never told Minor about her qualifications.

144. Minor considered Wilson's conduct at this interview to be unprofessional and was disappointed with her.

145. Minor also met with Hahn to discuss the promotion. Hahn conducted himself in a very professional manner,

addressed the qualifications which he believed he brought to the job, and ended the interview by thanking Minor for considering him. Minor left Hahn with no feeling whatsoever about his chances of receiving the corporate credit manager position.

146. Wilson later came to Minor and asked him to discuss her shortcomings with her. Minor spoke to Wilson about her lateness in the morning and her lateness at lunch. Minor talked to Wilson about her credit presentations and her style of management as being condescending and harsh on the telephone. Wilson was very disappointed and could not understand how Minor could ever consider anyone but herself. Wilson got up from her chair and walked out of that meeting prior to its conclusion.

147. During the interview process, Minor had prepared a list of qualifications for the corporate credit manager position which included analytical ability, financial analysis, logical thought process, interactions with management, customers, and others within the organization, ability to correspond in writing and orally, management ability, the ability to motivate subordinates and run a harmonious office, and technical understanding of credit.

148. Minor recommended that Hahn be promoted to corporate credit manager because he was better qualified than Wilson. Minor believed that Hahn's credit experience was more analytical because he had more experience with problematic accounts.

149. Minor believed that Hahn's financial analysis skills were stronger than Wilson's. Financial analysis was "ten times" more important to the position of corporate credit manager than to the position of regional credit manager.

150. Length of experience in credit was not a major criteria to Minor for the corporate credit manager promotion because he worked with Hahn and Wilson since 1983 and 1984 and knew what their experience brought to them.

151. Management skill was important to the corporate credit manager position. A number of people reported to that

position; the Credit Department had the most important asset of Foster because accounts receivable was collateral for bank loans. It was important that the Credit Department function smoothly and the corporate credit manager must motivate people to do that. Based on Minor's experience with Wilson and Hahn, Wilson's management style was that of a dictator. Hahn's management style was that of a manager, trying to get subordinates to promote themselves and their understanding and knowledge of credit and motivating them.

152. Hahn's credit presentations were better than Wilson's, more complete, more consistent with recommendations. Credit presentations were important to the corporate credit manager's job because that person had to supply oral and written presentations to top management of the company. The corporate credit manager was called on to give presentations to try to make top management understand the situation and explain why the company made a particular decision. It was important to be well prepared to approach management.

153. The candidates' dedication to the company was important to Minor. Wilson demonstrated her lack of dedication to Minor by her tardiness in the morning, her late lunch hours, and her consistent comments about returning to Houston. Minor did not believe Wilson's comment on or about December 10, 1987, that she changed her mind about leaving Pittsburgh, particularly since she had this change of mind immediately after Minor's promotion was announced.

154. Minor did not require that the corporate credit manager have a college decree. He would require a degree for an outside candidate but he was familiar with the qualities and skills of Hahn and Wilson.

155. Minor discussed the candidates with Terpenning prior to his final decision. Minor brought his checklist of qualities and compared each candidate's qualifications for Terpenning. Human Resource approval is required. Terpenning could have overruled Minor's recommendation and had overruled other managers' recommendations in the past.

156. Because Minor was selecting between a male and a female candidate, it was important to Terpenning that he

review the specific criteria and weigh the candidates' strengths. Minor discussed with Terpenning, in addition to the criteria necessary for the position, the specific areas where Hahn excelled: leadership, credit presentations, and dedication. Minor conveyed to Terpenning his concern about Wilson's long lunches, lateness for work in the morning and her comments about leaving Pittsburgh.

157. Terpenning was satisfied with Minor's explanations as to why he selected Hahn over Wilson. Terpenning was satisfied that Hahn was better qualified for the corporate credit manager position than Wilson.

158. Minor prepared a Personnel Requisition for the corporate credit manager position on January 26, 1988, and signed on January 29, 1988, after he had selected Hahn for the promotion. The Personnel Requisition was prepared to get the paperwork through. The qualifications on the Requisition are those that Minor would expect from an outside candidate whose skills and experience Minor could not judge from personal working relationships.

I. Personnel Practices and Equal Employment Opportunity at L.B. Foster

159. Foster had an equal employment opportunity policy in place in 1987 and 1988.

160. Terpenning was responsible for the company's compliance with its affirmative action plan. The affirmative action plan did not apply to the promotion of corporate credit manager in these circumstances. Wilson was already listed as an official on the affirmative action plan, and thus because Minor was considering Wilson and Hahn, the promotion of Wilson would not affect the company's affirmative action utilization data.

161. Terpenning was responsible for assigning grade levels to company positions. She evaluated the regional credit manager position and assigned a level eight. Terpenning assigned Hahn a grade level eight as regional credit manager. Wilson's grade level when she came to Pittsburgh was grade 11 so she was "grandfathered" and the company did not reduce

her level when the Credit Department was centralized. Wilson's level in Houston was an 11 because prior to Terpenning's employment, the personnel function was not centralized and differed by region.

162. After Wilson's resignation, Minor hired Sandra Susini, female, as regional credit manager. Minor promoted Susan Taschner, female, from district credit manager to regional credit manager. Minor promoted Carol Koss, female, from district credit manager to regional credit manager. Minor promoted Georgette Pelegrino, female, from administrative assistant to district credit manager. Minor promoted Jane Morgan, female, to credit analyst.

163. Females have held significant positions within the Credit Department. Wilson was regional credit manager. Nancy Dean was regional credit manager. Gay Kerlin was regional credit manager. Eileen Roberts was credit and collections manager. Susan Taschner, Carol Koss, and Sandra Susini all served as regional credit managers.

164. The only male employee promoted by Minor since the centralization of the Credit Department in 1986 was Hahn.

165. Females have held significant positions at Foster, including Linda Terpenning (Vice President, Human Resources, officer of the company), Kate Carey (corporate manager, Internal Audit), Mary Alice Reardon (Assistant Treasurer), Linda Patterson (accounting manager), Leah Turner (international district manager), Mary Brumbaugh (tubing sales manager, Chicago), Cheryl Boyd (payroll manager).

166. During the 1986 cutbacks, there was an opening in the Credit Department for someone with credit experience. Terpenning reviewed the backgrounds of all of the individuals who were going to be laid off, and noticed that Bill Riker, who was employed in Foster's MIS Department, had significant credit experience. Terpenning approached Minor and asked him if he would consider Riker for an open position. Riker had 15 years experience at a former employer as a controller, including responsibility for the overall credit function. In lieu of a layoff, Riker was transferred to the Foster Credit

Department at a substantial salary reduction. Riker still suffered a 15% decrease in connection with the transfer to the Credit Department.

167. Minor approached Terpenning to request that Beth Moore's salary be raised. In response, Terpenning reviewed Moore's job and determined that no additional increase was warranted. A salary freeze was in effect and the job did not warrant additional money under any circumstances.

168. Minor appealed Terpenning's recommendation. He wrote a letter to Tom Upchurch, copying Joe Dugan, requesting an increase for Moore.

169. Moore's salary was increased as a result of Minor's request.

170. In 1987 Minor was dating a female company employee, Dee Hecker. Hecker was employed in the fabricated products division. Minor's relationship with Hecker was well known to company employees. Hecker never reported to Minor.

171. Minor's relationship with Hecker did not interfere with his responsibilities in the Credit Department.

172. Neither Wilson nor any other company employee conveyed to Minor or Terpenning their belief that Minor's relationship with Hecker was inappropriate or otherwise interfered with company business.

173. Minor's relationship with Hecker did not violate the company's sexual harassment policy because Minor could not influence employment decisions with respect to Hecker.

174. Foster policy did not prohibit employees from dating.

175. Wilson did not like Hecker.

176. Minor's relationship with Hecker did not enter into the decision to promote Hahn.

177. Minor was assigned the duty of handling the commercial insurance of the company. Minor went to Hahn and asked for someone to assist him with the insurance assistance responsibilities. Hahn recommended that Minor give some insurance responsibilities to Koss.

J. Wilson's Resignation

178. Minor told Hahn and Wilson on Friday, January 29, 1988, that he had selected Hahn as corporate credit manager.

179. Two days later, Wilson called Minor on Sunday afternoon. Wilson said that she could not accept Minor's decision, could not work with Hahn, that she was quitting and would be in on Monday to pick up her personal effects and leave. Wilson told Minor that she was going to file a sex discrimination suit and that Minor had used very poor judgment in naming Hahn as corporate credit manager.

180. Wilson came in the office on Monday and told Minor that she thought about it further. Wilson said she was resigning and would leave that day, that it was a poor judgment to select Hahn and that she was sorry she called Minor at home. Wilson said she no longer felt that she was discriminated against on the basis of her sex and that she would not file sex discrimination charges.

181. Minor told Wilson that he was sorry that she decided to leave, that he did not want her to leave, that nobody had lost any respect for her, and that he felt that he made the proper decision. Wilson told Minor that she could not accept his decision to promote Hahn.

182. Wilson did not offer to give any notice of her resignation. Minor and Terpenning did not want Wilson to resign. If she had offered to give notice, Minor and Terpenning would have accepted it because they believed the intervening time would give Wilson an opportunity to change her mind or to ease the transition for a new employee.

183. Wilson met with Terpenning on Monday. Terpenning asked Wilson to reconsider her decision to leave. Terpenning told Wilson that she could take a few days off with pay to think about it. Terpenning told Wilson she would not be entitled to unemployment compensation, so even if she did not want to stay at Foster permanently, she should at least stay until she found another job. Wilson visited Terpenning again approximately ten days later. Terpenning again asked Wilson to reconsider and the company would pay her for any lost time.

184. Wilson was earning $49,500 annually at the time she resigned. Her responsibilities as regional credit manager would not have changed after Hahn was promoted. There remain two regional credit managers at Foster. Wilson's salary would not have been decreased.

185. If Wilson had stayed, there were other promotions at the company which were available to her. She would be considered for corporate credit manager if Hahn resigned or was transferred. The company realized a large profit at the end of 1987 and job opportunities became available in 1988 in sales, accounting and insurance jobs.

K. References

186. Foster's practice in response to reference checks for former employees is to confirm dates of employment and position held. This practice applies to both oral and written references.

187. After Wilson resigned, Minor received a telephone call from Johnston Pump and Valve Company which is a major customer of Foster. Minor was very familiar with Johnston Pump and Valve and had visited them on two occasions.

188. Minor told the caller that he could not give a reference on Wilson and transferred the caller to Terpenning in the Personnel Department.

189. Minor was concerned about giving Wilson a reference because of the circumstances under which she left; i.e., resigning without notice because she did not want to work for the person Minor promoted. Minor did not want to hurt Wilson, he wanted her to find subsequent employment, and he was concerned in providing a reference that he would have to convey the reasons under which she left which would not be favorable to Wilson.

190. When Minor received the call from Johnston Pump, he did not believe that Wilson was going to file a sex discrimination charge because Wilson had told him that she had changed her mind and would not do that.

191. Terpenning received the call from Johnston Pump, and confirmed Wilson's dates of employment and position held. Terpenning's response was in conformance with her normal practice when she received calls for references.

192. When Terpenning provided information to the caller from Johnston Pump, she had no knowledge that Wilson would file a sex discrimination claim.

193. Wilson called Terpenning after Terpenning provided information to Johnston Pump. Terpenning explained to Wilson the normal procedure for references, and told Wilson that she needed to submit a written consent in order for the company to release anything other than dates of employment and position held. Wilson said that she would submit a written consent. Terpenning told Wilson that, in the meantime, if Wilson wanted Terpenning to do so, Terpenning would provide a reference based on Wilson's verbal consent.

194. Foster did not receive any other telephone calls for references for Wilson. If it had received telephone calls, the company would have provided those callers with a reference based on Wilson's verbal consent.

195. Wilson never provided the company with the general written authorization which the company requested for release of reference information.

196. It is common practice for employers to release only position held and dates of employment on former employees. This does not negatively impact on subsequent employers.

197. Foster later provided a written recommendation for Wilson in response to a request of Vulcan Products which contained Wilson's written release.

198. Minor had responded to reference requests from other former employees in circumstances when the employee advised Minor that they would be using his name or Minor indicated to the former employees that they could use his name as a reference. In both circumstances, Minor understood that he had the employee's verbal consent to release reference information.

199. Minor provided references for employees who were laid off in 1986, including Nancy Dean, Beth Moore and Gay Kerlin. Minor offered to all employees who were laid off from the Credit Department in 1986 that he would be willing to give them references. Dean and Kerlin called Minor and told him that they had used his name as a reference.

L. "After-Acquired" Evidence

200. Jerry Fields, Foster's former Vice President of Pipe Products, left the company in January 1985 through mutual agreement after a disagreement with his direct supervisor. Fields was offered a severance package contingent upon the fact that he would not go into a competing business. Within a matter of days, Fields went into a competing business which he, in fact, had started up before he left the company. Fields left with other Foster employees. Fields brought a lawsuit against Foster for severance pay. Foster counterclaimed for tax liability on stock that had vested.

201. After Fields, Ronnie Roberts and Charles Chenowith left Foster and started their own company, they called Wilson several times seeking her advice on how to set up their credit files and how to check new clients. Until Corbett's testimony in this lawsuit in court, the company was not aware that Wilson had contact with these former employees or that she was providing them information.

202. If Terpenning had known about Wilson's contact with Fields and Chenowith at the time Wilson was still employed by Foster, concerning any aspect of his business, she would have been discharged. The company had discharged other employees in similar circumstances.

Conclusions of Law

A. Jurisdictional Prerequisites

1. This action is brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq* alleging that Foster discriminated against Wilson on account of her sex by not promoting her to corporate credit manager.

2. The Civil Rights Act of 1991 does not apply retroactively to this action.

3. This Court has jurisdiction over plaintiffs' Title VII claim pursuant to 42 U.S.C. § 2000e-5(f)(3) and 28 U.S.C. § 1391.

4. Venue in this district is proper since Wilson was a resident of the Western District of Pennsylvania, was employed in this district and was terminated here. 42 U.S.C. § 2000e-5(f)(3) and 28 U.S.C. § 1391(c).

5. Wilson was an employee of Foster within the meaning of 42 U.S.C. § 2000e(f).

6. Foster was an employer of Wilson within the meaning of 42 U.S.C. § 2000e(b).

B. Promotion Decision as a Pretext Case

7. A plaintiff can prove a violation of Title VII either under a pretext theory or a mixed motive theory. *Armbruster v. Unisys Corp.*, __ F.3d. __ (3d Cir. 1994); *Hook v. Ernst & Young*, 28 F.3d 366 (3d Cir. 1994); *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 521-22 (3d Cir. 1992), *cert. denied* 114 S.Ct. 88 (1993).

8. Under Title VII, the burdens and order of proof in a pretext case are as follows: First, the plaintiff has the burden of proving the preponderance of the evidence of a prima facie case of discrimination. Second, if the plaintiff succeeds in proving a prima facie case, the burden shifts to the defendant to articulate some legitimate, non-discriminatory reason for the employee's rejection. Third, should the defendant carry this burden, the plaintiff must then have the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

9. The plaintiff in a sex discrimination case can establish a prima facie showing of promotion discrimination by demonstrating that she is a member of the protected class, that she was qualified for the position, that she was not promoted into

a job for which she was qualified, and that the position was given to a male. *Armbruster v. Unisys Corp., supra; Ezold v. Wolf, Block Schorr and Solis-Cohen,* 751 F. Supp. 1175, 1191 (E.D. Pa. 1990), *reversed on other grounds*, 983 F.2d 509 (3d Cir. 1992).

10. A plaintiff's burden of proof at the prima facie stage is easily met. *Bhaya v. Westinghouse Elec. Corp.*, 832 F.2d 258, 260 (3d Cir. 1987), *cert. denied,* 488 U.S. 1004 (1989).

11. A plaintiff need not demonstrate on her prima facie case of promotion discrimination that she was the most qualified, but only that she fell in the general range of those considered by a defendant. *Ezold,* 751 F. Supp. at 1191.

12. Wilson has established a prima facie showing of promotion discrimination under a pretext theory.

13. After a plaintiff has established a prima facie case, the burden of going forward then shifts to the defendant "to dispel the adverse inference by articulating 'some legitimate, non-discriminatory reason for the employee's rejection.'" *Armbruster, supra; Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395 (3d Cir.), *cert. denied,* 469 U.S. 1087 (1984), *quoting Burdine,* 450 U.S. at 253.

14. A Title VII defendant's articulated reasons for the adverse employment decisions must be reasonably clear and specific if the defendant is to succeed in rebutting plaintiff's prima facie showing of discrimination. *Burdine,* 450 U.S. at 255-56.

15. Foster articulated legitimate reasons for promoting Hahn rather than Wilson sufficient to rebut Wilson's prima facie showing of discrimination. The company has established that Hahn was promoted because his analytical skills, financial analysis and management skills, dedication to the company and credit presentations were superior to Wilson's.

16. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and drops from the case. *Burdine,* 450 U.S. at 255 and n. 10; *Armbruster, supra.* If the defendant succeeds in articulating a legitimate non-discriminatory reason for its decisions, the plaintiff

must then have the opportunity to demonstrate that the articulated reason was not the true reason for the employment decision. Plaintiff may succeed in this either directly by persuading the trier of fact that the discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. *Burdine*, 450 U.S. at 256 (citations omitted).

17. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253; *St. Mary's Honor Center v. Hicks*, 125 L.Ed. 2d 407, 419 (1993); *Armbruster, supra.*

18. "A reason cannot be proved to be a 'pretext for discrimination' unless it is shown *both* that the reason was false, and that discrimination was the real reason." *St. Mary's*, 125 L.Ed. 2d at 422; *Burdine*, 450 U.S. at 258.

19. "That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of [sex discrimination] is correct." *St. Mary's*, 125 L.Ed. 2d at 427.

20. "To prevail at trial, the plaintiff must prove not that the illegitimate factor was the sole reason for the decision, but that the illegitimate factor was a determinative factor in the adverse employment decision, that is, that but for the protected characteristic, the plaintiff would have been hired (or promoted)." *Fuentes, supra. See also Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701 (1993) (under ADEA claim, "A disparate treatment claim cannot succeed unless the employee's protected trade actually played a role in process and had a determinative influence on the outcome."); *Lewis v. University of Pittsburgh*, 725 F.2d 910 (3d Cir. 1983), *cert. denied*, 469 U.S. 892 (1984).

21. The trier of fact may not determine whether the company had good or bad reasons for not promoting plaintiff or whether the factfinder agrees with the decision reached by the company. The issue for the factfinder is whether the decision was motivated by sex discrimination. *Burdine*, 450 U.S. at 257-58 (1981).

22. Casting doubt on the propriety of one of several reasons articulated by the employer does not mean that its reasons are unworthy of credence. *Logue v. International Rehabilitation Associates, Inc.*, 837 F.2d 150, 155 (3d Cir. 1988).

23. The fact that the plaintiff has more experience than the person selected for the position is not sufficient to establish pretext. *Parrott v. Cheney*, 748 F. Supp. 312, 317 (D. Md. 1989), *aff'd*, 914 F.2d 248 (4th Cir. 1990).

24. Barring any attempt to hide discrimination, the company has a right to make business judgments on employee status, particularly when the decision involves subjective factors that the company deems essential to high level positions. *Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1220 (3d Cir. 1988), *cert denied*, 490 U.S. 1098 (1989).

25. When a decision to hire or promote one person rather than another is reasonably attributable to an honest even though partially subjective evaluation of qualifications, no inference of discrimination can be shown. *Lieberman v. Gant*, 630 F.2d 60, 67 (2d Cir. 1980).

26. An element of subjectivity is essentially inevitable in all employment decisions. *Equal Employment Opportunity Commission v. Aetna Ins. Co.*, 616 F.2d 719, 726 (4th Cir. 1980).

27. Liability under Title VII demands more than proof that a qualified male was chosen over a qualified female. *Kachel v. City of Pueblo*, 743 F. Supp. 749, 755 (D. Colo. 1990).

28. An employer may hire or promote persons it feels are more qualified without being subject to liability under Title VII because it failed to criticize the disappointed employee. *Stone v. Galaxy Carpet Mills, Inc.*, 63 Fair Empl. Prac. Cases (BNA) 171, 177 (N.D. Ga. 1993).

29. Wilson has not established her burden of proving pretext under *Hicks* that the company's articulated reasons for not promoting her are false and that sex discrimination was the real reason.

30. Instances of conduct relied upon by Wilson do not evidence a discriminatory intention and do not support a finding of pretext.

C. Promotion Decision in a Mixed Motive Case

31. In a mixed motive case, the plaintiff's burden of establishing a prima facie case is more onerous than in a pretext case. *Armbruster, supra; Fuentes, supra; Griffiths v. CIGNA Corp.*, 988 F. 2d 457, 470 (3d Cir. 1993), *cert. denied*, 114 S.Ct. 186 (1993). Plaintiff establishes a prima facie case by showing by *direct* evidence that an illegitimate factor, gender, had a "motivating" or "substantial" role in the employment decision. *Hazen v. Biggins, supra; Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989); *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 521-22 (3d Cir. 1992).

32. In saying that gender played a motivating part in an employment decision, the standard applied is "if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman." *Price Waterhouse*, 490 U.S. at 250.

33. If the plaintiff makes such a showing, the burden shifts to the employer to prove by a preponderance of the evidence "that it would have made the same [employment] decision . . . even in the absence of" the impermissible factor. Price Waterhouse, 490 U.S. at 244-45.

34. Not all evidence that is probative of discrimination will entitle the plaintiff to shift the burden under *Price Waterhouse*. At a bare minimum, a plaintiff in a mixed motive case is required as part of her prima facie case to advance circumstantial evidence "of conduct or statements by persons involved in the decision making process that may be viewed as directly reflecting the alleged discriminatory attitude." *Griffiths v. CIGNA Corp.*, 988 F.2d 457, 470 (3d Cir. 1993). *Also see Fuentes, supra.*

35. A plaintiff cannot establish a prima facie case of mixed motives unless she can satisfy the factfinder that "it is more likely than not" that an illegitimate factor played a motivating part in the employment decision. *Price Waterhouse*, 490 U.S. at 247, n. 12.

36. The circumstantial evidence of mixed motives "must be tied directly to the alleged discriminatory animus."

Ostrowski v. Atlantic Mut. Ins. Co., 968 F.2d 171, 182 (2d Cir. 1992).

37. Statements by non-decision makers or statements by decision makers unrelated to the decisional process itself are insufficient to establish that sex is a substantial factor in the decision. *Price Waterhouse*, 490 U.S. at 277 (O'Connor, concurring).

38. "Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision." *Price Waterhouse*, 490 U.S. at 251 (Brennan, plurality).

39. Plaintiffs have not met their burden of proving a prima facie case of discrimination under a mixed motive theory. Alternatively, the company has met its burden of proving that it would have made the same decision even in the absence of any illegitimate factors.

D. Retaliation Claim

40. To establish that activity is protected under Title VII, a plaintiff need not prove the merits of the underlying discrimination complaint, but only that she was acting under a good faith, reasonable belief that a violation existed. *Griffiths*, 988 F.2d at 468.

41. The order and allocation of burdens of proof in a retaliation case follow the standards established for Title VII claims in general. In pretext cases, the analysis erected by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), subsequently articulated in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and recently refined in *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 125 L.ed. 2d 407 (1993).

42. Former employees are protected from retaliatory actions by former employers. *Charlton v. Paramus Board of Education, et al*, 25 F.3d 194 (3d Cir., 1994)

43. In a case in which a plaintiff alleges denial of reference is retaliatory, the plaintiff must demonstrate that the employer's denial of a reference or the providing of a poor

reference caused an adverse employment action. *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1538 (11th Cir.), *cert. denied*, 111 S.Ct. 353 (1990).

44. Plaintiffs have not established a prima facie case of retaliation because she has introduced no evidence of any adverse employment action suffered by Wilson on the basis of any negative reference or refusal to provide a reference by Foster. There is no evidence that Foster's response to the telephone call from Johnston Pump negatively influenced Wilson's application for employment with Johnston Pump.

45. Because Foster provided a telephone reference which confirmed Wilson's dates of employment, and it is undisputed that Minor would have given Wilson a poor recommendation due to the circumstances under which she left, plaintiffs have not established that Foster took adverse action against Wilson.

46. The company's articulated legitimate, non-discriminatory business reasons for only providing names and dates of employment to Johnston Pump and Valve, i.e., that Wilson's reaction to the promotion, and the fact that she resigned so abruptly and without adequate notice, reflected poorly upon her.

47. Plaintiff has not met her burden of proving that Foster's conduct with respect to the Johnston Pump reference was causally related to her protected activity.

48. At the time Minor and Terpenning provided information to Johnston Pump regarding Wilson's employment, they did not have knowledge that Wilson was going to file a sex discrimination charge.

49. The company met its burden of persuasion of articulating legitimate, non-discriminatory reasons for responding to the Johnston Pump reference in the way it did.

50. Plaintiffs have not met their burden of proving that the company's articulated reasons were a pretext and that the company's real motivation was retaliation.

E. After Acquired Evidence

51. An employer is not protected from liability by virtue of after-discovered evidence, but may be protected from

certain damages. *Mardell v. Harleysville Life Ins. Co.*, __ F.2d __ (3d Cir. August 2, 1994); (The rule adopted in *Summers v. State Farm Mut. Auto Ins. Co.*, 864 F.2d 700 (10th Cir. 1988) ("Summers" rule), *rejected;* the use of after-acquired evidence does not preclude a finding of liability and it is limited to the remedies phase of a discrimination suit brought pursuant to Title VII or ADEA).

52. The Court rejects Foster's contention that based on the after-acquired evidence doctrine, plaintiff is not entitled to recovery.

Conclusion

The Court specifically finds that Wilson's sex was not a factor in Foster's decision not to promote her to the position of corporate credit manager. Wilson's sex was not a determinative factor in that it did not play a role in the promotion process and did not have a determinative influence on the outcome of the process. Nor did Wilson's sex have a "motivating" or "substantial role" in the promotion process.

Having found in favor of Foster on the issue of liability, the Court need not and will not make findings concerning the issue of damages.

Conclusion of Law Re: Counterclaim

53. Wilson is liable to Foster on the promissory note (Exhibit W8) and judgment will be entered in favor of Foster and against Wilson on the counterclaim of Foster.

An Order also directing Foster to submit to the Court a statement of the total amount it claims is due and owing for principal, interest and attorneys' fees on the promissory will be entered.

Lee, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND JO ANN WILSON *Plaintiffs,*	)	
vs.	)	Civil Action No. 90-0758
L.B. FOSTER COMPANY, *Defendant.*	)	

ORDER OF COURT

AND NOW, this 13th day of September, 1994, it is hereby

ORDERED that judgment is entered on behalf of L.B. Foster Company, defendant, on all claims of the plaintiffs, Equal Employment Opportunity Commission and Jo Ann Wilson;

IT IS FURTHER ORDERED that judgment is entered for the defendant, L.B. Foster Company, on its counterclaim against the plaintiff, Jo Ann Wilson, in the principal amount of $8,500, together with applicable interest, and attorneys' fees, if any, to be determined by the Court.

IT IS FURTHER ORDERED that on or before September 22, 1994, the defendant, L.B. Foster Company, shall file a statement of interest and attorneys' fees, if any, it claims is due and owing on the promissory note (Exhibit W-8).

Donald J. Lee
United States District Judge

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